(1)

Supreme Court, U.S.
FILED

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UNITED STATES SUPREME COURT

LOUIS F. GAINES,
Plaintiff - Petitioner

v.

WHITE RIVER ENVIRONMENTAL PARTNERSHIP, Et Al.,
Defendants - Respondents

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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317 -- 283 - 4821

118 pp

QUESTIONS FOR REVIEW

1. If the "Lower Courts" have used a system of "Double-Standards" to grant summary judgments to the Defendants, which deny Pro Se Plaintiff due process and equal protection of the law - then what relief is the Plaintiff due? See "Material Facts," PP. 4-16, for example.

2. On January 30, 1994, Indianapolis, IN., hired the Defendants to manage and operate their two wastewater treatment plants: Belmont and Southport, which constantly affect commerce. For the purpose of Title 42 U. S. C., § 1983 - did the "Lower Courts" error in claiming that the Defendants are <u>not</u> "State Actors?" See PP. 16-17.

3. If, on the one hand, the Defendants have engaged in employment practices against the Plaintiff that provoke litigation; and, if, on the other hand, the "Lower Courts" will <u>not</u> defend the Plaintiff's rights against the Defendants - then should the $3,600.00 in sanctions against the Plaintiff be allowed to stand? The Plaintiff has been trying to defend himself against the Defendants in the form of Pro Se. See PP. 17-19.

4. Should EEOC "Form 5" be revised, or declared "Unconstitutional," because it is bias in favor of employers? By design, only one or two "Respondents" can be listed on the form, which can affect the outcome, if there are three or more "Respondents" that are being charged with unlawful discrimination in employment. The above flaw can affect millions of "Citizens." See P. 19.

5. Given the limitation of EEOC "Form 5," if the Plaintiff properly named the parties in the "Complaint," then does the latter take priority over the former. In other words, did the "Lower Courts" dismiss any party in error, simply because it was not listed on the above form? Ibid.

6. On June 2, 1999, the Defendants caused Pro Se Plaintiff to suffer an on-the-job, "Irreparable Injury," during discovery; in *Gaines v. White River Environmental Partnership, et al.*, IP 98-C-741-M/S. If the Seventh Court can collect $3,600.00 in sanctions against the Plaintiff, if the Defendants have provoked all litigation in the fist place; then when will the Plaintiff get paid for the above injury? See PP. 4-7.

7. If the Defendants used deceit or misrepresentation to get the District Court, in . . ., 1524, to dismiiss EEOC Charge #240-A20-1240, and if the District Court, in . . . , 0595 took jurisdiction of the foregoing charge in error, and also determined the merits in error; and, if these errors were affirmed upon appeal - then what relief is the Plaintiff due? Ibid.

8. Can the Federal Rules of Civil Procedure, Rule 9b, be used as an authority to seek relief from "Fraud?" See PP. 13-15. The Lower Courts denied relief under Title 42, U. S. C., § 1983 on the claimed that the Defendants are not "State Actors," but failed to address the application of Rule 9b. If this procedure denied Pro Se Plaintiff due process and/or equal protection of the law, then what relief is due?

9. What other relief is Pro Se Plaintiff due?

LIST OF PARTIES

1. LOUIS F. GAINES, Petitioner
   5337 North College Avenue
   Indianapolis, IN 46220 - 3141

2. WHITE RIVER ENVIRONMENTAL PARTNERSHIP, Et. Al., Respondent
   2700 South Belmont Avenue
   Indianapolis, IN 46221

3. IWC RESOURCES CORPORATION,
   Managing Partner, and Respondent
   1220 Waterway Boulevard
   Indianapolis, IN 46206

4. SUEZ, Partner, and Respondent
   16 Rue De La Ville Leveque
   75383 Paris Cedix 08
   France

5. UNITED WATER SERVICES, Inc.
   Partner, and Respondent
   200 Old Hook Road
   Harrington Park, NJ 07640

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UNITED STATES CONSTITUTION:

First Amendment: P. 3.

Fifth Amendment: PP. 2, 3 & 20.

Eighth Amendment: PP. 2, 3 & 20.

Thirteenth Amendment: PP. 2 & 3.

TITLE 28 U. S. C.

§ 1254: P. 1.

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§ 623(a): PP. 2 & 20.

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§ 1391: P. 3.

§ 1981: PP. 2, 3 & 20.

§ 1981(c): P. 2.

§ *1983:* PP. 2, 3, 17 & 23.

§ *2000e-2(a):* PP. 2 & 20.

§ *2000e-2(k)(c)(2):* PP. 2 & 20.

§ *2000e-2(m):* PP. 2 & 20.

§ *2000e-3(a):* 2 & 20.

§ *2000e-5:* P. 3.

FEDERAL RULES OF:

Appellate Procedure, Rule 35: PP. 2 & 20.

Appellate Procedure, Rule 38: PP. 2, 18 & 20.

Civil Procedure, Rule 56: PP. 2 & 20.

Evidence, Rule 406: 2, 3, 20 & 23.

CITATION OF OPINIONS OR REPORTS

LOUIS F. GAINES v. WHITE RIVER ENVIRONMENTAL PARTNERSHIP, Et Al .:

530 U. S. 1230; 120 S. Ct. 2661; 147 L. Ed. 2d 275; June 12, 2000.

534 U. S. 952; 122 S. Ct. 349; 151 L. Ed. 2d 263; October 9, 2001.

202 F. 3d 272; January 3, 2000.

248 F. 3d 1157; March 23, 2001.

No. 02-4289 & 03-1967, July 24, 2003; see Appendix A., PP. 1 - 8.

No. 1: 02 cv 1524 - DFH, November 27, 2002; Ibid., B., PP. 9 - 13.

No. IP 02-0595-T/K, March 14, 26, 27, & 31, 2003; Ibid., C., PP. 14 - 61.

IP 98-1741-C-M/S, August 19, 1999, and October 25, 1999; 00-2802, March 23, 2001, and May 17, 2001; Ibid., D. PP. 62 - 72.

SUPREME COURT 's JURISDICTION

One, the "Order" of the Seventh Court was entered on July 24, 2003. See Appendix A., P. 1. Two, Rule 11 does not apply. Three, a Petition for a Rehearing was not allowed. Four, this matter comes to the Supreme Court on the authority of Tile 28, U.S.C., § 1254.

CONSTITUTION & OTHER AUTHORITY

United States Constitution: the Fifth, Eighth, and Thirteenth Amendments. See Appendix E. , P. 74.

Title 29, U. S. C. , §§ 623(a) & 623 (d). Ibid.

Title 42 U. S. C. , §§ 1981; 1981(c); 1983; 2000e-2(a); 2000e-2(k)(c)(2); 2000e-2(m), and 2000e-3(a). Ibid., PP. 75 - 76.

Federal Rules OF:

Appellate Procedure, Rule 35. Ibid., E., PP. 76 - 77.

Appellate Procedure, Rule 38, Ibid., P. 78.

Civil Procedure, Rule 56, Ibid., P. 78.

Evidence, Rule 406, Ibid., P. 79.

STATEMENT OF THE CASE

Jurisdiction Of The Lower Courts:

1. Gaines v. WREP, Et Al., IP-02-0595-C-T/K, represents a continuing case involving unlawful discrimination in employment. On April 19, 2K02, a complaint was filed with the United Sates District Court, Southern District of Indiana, at Indianapolis; and, it was brought on the following authority: (1) Title 28, U.S.C., §§ 1330, 1331, 1332 & 1343; (2) Title 29, U.S.C., § 626;

(3) Title 42, U.S.C., §§ 1391, 1981, 1983 & 2000e-5; (4) the First, Fifth, Eighth & Thirteenth Amendments of the U.S. Constitution; (5) the Federal Rules of Civil Procedure, Rule 9, and the Federal Rules of Evidence, Rule 406. On March 27, 2K03, however, the Plaintiff's Summary Judgment Motion was denied, and the Defendants' were granted. The Plaintiff timely appealed to the Seventh Court.

2. On October 4, 2K02, another suit involving unlawful discrimination in employment had to be brought against the same defendants, and under Gaines v. WREP, Et Al., 1:02-CV-1524-DFH. The jurisdiction was the same, or essentially the same, as expressed in ¶ 1., above. Through the use of deceit or trickery - the Defendants were able to get this suit dismissed November 27, 2K02. Pro Se Plaintiff timely appealed to the Seventh Court.

3. The Seventh Court received the above appeals on the authority of Title 28, U.S.C., § 1291. On its initiative or motion, the Seventh Court combined the above cases, and on July 24, 2K02 did the following: (1) affirmed the summary judgments for the Defendants; (2) at the encouragement of the Defendants - the Seventh Court fined Pro Se Plaintiff $2,500.00 for allegedly bringing "frivolous" appeals; (3) proposed other sanctions against the Plaintiff. In response to the foregoing sanctions, Pro Se Plaintiff timely paid the fine, and timely filed papers against it; however, such payment and fillings do <u>not</u> appear on the Seventh Court's docket sheet for either case: 02-4289 or 03-1967! This appeal to the Supreme Court, however, timely follows.

Material Facts To Consider:

Motions to amend, and summary judgments:

1. In *Gaines v. White River Environmental Partnership, et al.*, IP-98-1741-C-M/S; the Defendants caused Pro Se Plaintiff to suffer an on-the-job, "Irreparable Injury" on June 2, 1999, which took place during "Discovery." These events, however, followed: One, on June 10, 1999, Pro Se Plaintiff filed a motion to amend; see Appendix D., P. 65. Two, the District Court denied the motion, because EEOC had not issued a right to sue; Ibid., P. 64-5. Three, on July 9, 1999, the Defendants filed a summary judgment motion; Ibid., P. 67. Four, on or about July 10, 1999, EEOC's right to sue letter was received by the Plaintiff, and on July 12, 1999 - a copy was filed with the District Cour; Ibid., P. 66. Five, the District Court continued to deny motions to amend - because the Defendants had filed a summary judgment motion on July 9, 1999; Ibid., P. 67.

2. The above procedure in ¶ 1 was affirmed upon appeal, on March 23, 2K01, and May 17, 2K01, in . . . , 00-3802. Ibid., PP. 69 - 72. Here, the Seventh Court fined Pro Se Plaintiff $1,000.00 for allegedly bringing a frivolous appeal. Ibid., P. 72. Also see ¶ 1, above.

3. In *Gaines v. White River Environmental Et Al.*, IP 02-0595-T/K, these events took place: One, on March 4, 2K02, EEOC Charge #240-A20-1240 was filed, and "Retaliation" was claimed; Ibid., Appendix C., P. 41. Two, on April 19, 2K02, the "Complaint" was filed, which

only included rights-to-sue for EEOC Charges 240A12-467 and 240A200085; Ibid., P. 39. Three, on May 29, 2K02, the Plaintiff's Summary Judgment Motion was filed; Ibid., P. 43. Four, after filing his Summary Judgment Motion in May, 2K02; in July, 2K02, EEOC issued its right-to-sue for EEOC Charge 240A201240; Ibid. Five, after filing the above Summary Judgment Motion, Pro Se Plaintiff made no attempt to amend his "Complaint" to include EEOC Charge #240-A20-1240; Ibid., P. 44. Six, given the above - no evidence was presented in support of EEOC Charge #240-A20-1240; and, Pro Se Plaintiff objected to the Defendants' attempt to address the issues that the foregoing charge presented. See Appellant's Reply Brief for 02-4289, PP. 9-10; Appellant's Response Brief for 02-4289, PP. 6-7; and, Appellant's Reply Brief for 03-1967, PP. 4-5.

4. On October 4, 2K02, another suit was filed against the Defendants, under . . . , 1:02-CV-1524-DFH, which was based entirely on EEOC Charge #240-A20-1240, and a right-to-sue letter, dated July 30, 2K02. See Appendix A. , P. 4.

5. Based on the Defendants' deceit or trickery, the District Court, in ..., 1524, wrote the following on November 27, 2K02, as the reasons for dismissing EEOC Charge #240-A20-1240. Ibid., B., PP. 10-11:

ENTRY

> "As part of its general power to administer its docket, a district court

may stay or dismiss a suit that is duplicative of another federal court suit." *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000). The claims asserted in this action are or could be asserted in *Gaines v. White River Environmental Partnership, et al.*, No. IP 02-595-C-T/K. Accordingly, the defendants' motion to dismiss is granted insofar as based on the argument that this duplicative action should not be permitted to proceed. The court does not reach any of the other arguments presented by the defendants in their motion to dismiss.

Judgment dismissing this action without prejudice shall now issue.

So ordered

S / DAVID F. HAMILTON, Judge
United States District Court

Date: 11/27/02.

6. After the summary judgment for the Defendants in . . . , 1524 was appealed to the Seventh Court, under . . . , 02-4289; the District Court in 0595 allegedly determined the merits of EEOC Charge #240-A20-1240, and denied all relief. Ibid., C., PP. 41-44, and PP. 49-56, for

example. Also see ¶ 3., above, PP. 4-5.

7. The above procedure was affirmed by the Seventh Court, which included the following conclusion or determination. Ibid., A., P. 6:

> . . . , A district court's denial of a motion to amend, even if erroneous, does not justify the filing of the proposed amendment as a new lawsuit.

Time enlargements & summary judgments:

1. In its "Entry" for June 14, 2K02, the District Court wrote the following, in IP-02-595. See Appellant's Reply Brief for ..., 02-4289, Appendix, P. 22:

> ENTRY DIRECTING . . .
>
> The defendants shall have through July 10, 2002, in which to respond to the plaintiff's motion for summary judgment and in which to file a cross-motion for summary judgment or any other appropriate dispositive action.
>
> IT IS SO ORDERED
>
> S / JOHN D. TINDER, Judge
> United States District Cout
>
> Date: 6/13/2002

2. After July 10, 2K02, the Defendants filed a series of motions for time enlargements, to respond to the Plaintiff's Summary Judgment Motion, which was filed on May 29, 2K02. See Appellant's Brief for ..., 03-1967, Appendix, "Docket Sheets," Items #23, 25, 27, 28, 32, 33, 37 & 68, for example; PP. 38-41.

3. In every case - each time enlargement was granted to the Defendants. Ibid.

4. On September 3, 2K02, the Defendants' Summary Judgment Motion was filed. Ibid., P. 39., Items #38-43.

5. On September 10, 2K02, the Plaintiff's Motion For A Favorable Summary Judgment As A Matter Of Law, Or Grant Other Appropriate & Fair Relief was filed. Here, the Plaintiff asked for the following relief. Ibid., P. 80:

> a. Grant the Plaintiff a favorable 'Summary Judgment Ruling,' as a matter of law.
>
> b. If the Court rejects the above relief, as request (sic) in Paragraph 1.a., then grant the Plaintiff a fifteen-month time enlargement to appropriately and timely respond to the Defendants' Motion For Summary Judgment, and other related filings - which were "Untimely" filed on September 3, 2K02. . . .

6. The District Court in ..., 0595: (1) would not assign any type of deadline for the Plaintiff to meet; and, (2) would not grant any type of time enlargement to Pro Se Plaintiff, to respond to the Defendants' Summary Judgment Motion! Ibid., PP. 39-41.

7. In its "Order" for July 24, 2K03, the Seventh Court affirmed the above procedure. See Appendix A., PP. 2-9.

8. In *Gaines v. White River Environmental Partnership, et al.*, IP-98-1741-C-M/S, for example; the District Court gave Pro Se Plaintiff through June 16, 2K, to fully respond to the Defendants' Summary Judgment Motion that was filed on July 9, 1999. Reference Appellant's Response Brief for 02-4289, Appendix, P. 11. This 11-month time enlargement was granted when no other lawsuit was before any Court. This procedure was approved on appeal in . . . , 00-3802, on March 23, 2K01. See Appellant's Reply Brief for 03-1967; Appendix, PP. 7-9.

Affidavits & summary judgments

1. In its "Entry" for March 14, 2K03, the District Court in . . . , IP 02-595-TK struck all five of the Plaintiff's "Answer Affidavits" to the Defendants' Summary Judgment Motion. See Appendix C., PP. 15-18.

2. The District Court claimed that Pro Se Plaintiff's "Affidavits" were: (1) untimely filed, and (2) were not based on Plaintiff's personal knowledge. Ibid., PP. 16-7.

3. On March 27, 2K03, Pro Se Plaintiff filed a motion to vacate the District Court's "Entry" of March 14, 2K03. See Appellant's Brief for 03-1967, Appendix, P. 41, Item #77.

4. In its "Entry" for March 31, 2K03, the District Court wrote in part the following. See Appendix C., PP. 59-60:

> The basis for each of these filings is that the plaintiff believes the court unfairly granted the defendants time to file their response to the plaintiff's motion for summary judgment while at the same time the court struck from the record several of the plaintiff's filing which were filed after his initial response to the defendants' motion for summary judgment. Any relief sought by the plaintiff's March 27, 2003 filing is denied. . . . Moreover, the defendants filed a single response to the plaintiff's motion. The plaintiff, on the other hand, never sought additional time to file any supplemental responses to the defendants' motion. Rather, he filed a series of responses, weeks or months apart, without leave of the court. This is not the proper manner in which to brief a pending dispositive motion. There was no error in the rulings issued on March 14, 2003.

5. See P. 8. ¶ 5.

6. As part of its "Order" affirming the summary judgment for the Defendants, the Seventh Court partially wrote the following. Ibid., A., PP. 5-6:

> . . . Gaines offers no explanation why he thinks the district court erred in granting extensions or striking his affidavits or how he might have been prejudiced as a result. We have warned Gaines that unsupported arguments will get him nowhere on appeal.

Disputed material facts

1. Having: (1) refused to grant Pro Se Plaintiff any type of time enlargement to respond to the Defendants' Summary Judgment Motion, or having failed to establish any type of deadline for him to meet; and, (2) stricken all the Plaintiff's "Answer Affidavits" - the District Court listed an assortment of "Undisputed" facts, as alleged. Ibid., PP. 28-38. Review these examples:

2. For "Fact 31," the District Court wrote the following to deny relief to the Plaintiff. Ibid., P. 34:

> Under the current work schedule, each individual shift supervisor is responsible for making sure that the Operations Specialist complete the cleaning duties as assigned or as

> needed. Christie Hedges (sic) was Gaines' supervisor, and she did not supervise Operations Specialists Pate, Wood, or Lawson.

3. The Defendants shift schedule contradicts the District Court's claim in ¶ 2. Ms. Hedge supervised Mr. Lawson two days per week, and the Plaintiff five days per week - during the same time period. See Appellant's Reply Brief for 03-1967, Appendix, "Plaintiff's Exhibits #342 & 345;" PP. 20 & 23.

4. For "Undisputed Fact #44," the District Court denied the Plaintiff relief on the following. P. 36:

> Operation Specialists Karen Uhlenhake, a white female, and Operations Specialists, James Lawson, a white male, worked schedules comprised largely of 7 p.m. - 7 a.m. and 11 p.m. - 7 a.m. Uhlenhake and Lawson had to visit the personnel office on their own time if they had business that required an in-person visit.

5. When Pro Se Plaintiff attempted to review personnel records on his own time, the Defendants defeated the attempt. See Appellant's Reply Brief, Appendix, "Plaintiff's Exhibit #343; P. 21. The Plaintiff worked the same hours as Ms. Uhlenhake, and Mr. Lawson. Ibid., PP. 20 & 23.

6. For "Undisputed Fact #58," the District Court wrote the following to deny the Plaintiff relief. See Appendix C., P. 38:

> WREP sets its wage level for all employees based on corporate guidelines that make no reference to race or sex.

7. The Defendants contradict the above statement, by maintaining a "Confidential File" on the Plaintiff, where pay is based on "Race" and "Sex." See Appellant's Reply Brief for 03-1967; Appendix, "Plaintiff's Exhibit #334," P. 19.

8. In affirming the summary judgment for the Defendants, the Seventh Court ignored all the above. See Appendix A., PP. 1-8.

Conspiracy and fraud:

1. On May 1, 1967, one of the Defendants Managers, Mr. R. Farnham, encouraged Pro Se Plaintiff, for example, to seek input into changing shift schedules, by writing the following. See Appellant's Reply Brief, Appendix; "Plaintiff's Exhibit #140," P. 18:

> Louis, thanks for your comments. I know that some employees do not care for the current shift arrangements. My desire is to allow as much employee input as possible

into the decision-making. My only criteria is that any shift arrangement must be equitable to all affected employees, must meet the company's needs for cross-training, and remain within budget. Aside from this criteria, the shifts could be rotating/ nonrotating, 12 hour/10 hour/8 hour, 5 shifts/4 shifts, and start on almost any hour of the day.

2. After May 1, 1997, Mr. Farnham then stood back and allowed "Managers" that he supervised to give the Plaintiff letters of reprimand, on July 11, 1997, and January 11, 2K01; for trying to get "Input" into changing shift schedules. Ibid., PP. 8-11.

3. On or about January 10, 2K01, several of the Defendants "Managers" agreed to give the Plaintiff a letter of reprimand. The Plaintiff was opposing a racially motivated work schedule at the time. See Appendix C., PP. 31-2.

4. After receiving the second letter of reprimand on January 11, 2K01, Pro Se Plaintiff finally realized that the "Input" into changing shift schedules, which Mr. Farnham previously encouraged, was really for "Whites" only. The Plaintiff is "Black." Ibid.

5. Having given the Plaintiff the above letter of reprimand on January 11, 2K01; on January 18, 2K01, the Defendants then blocked the Plaintiff's attempt to timely use their internal

grievance procedure to appeal the letter of reprimand. See Appellant's Reply Brief for 03-1967, P. 9.

6. In the Summer of 2K02, a "White Female," Ms. B. Miller, Operation Specialist, was allowed to change her work schedule - without receiving a letter of reprimand - unlike the Plaintiff, "Black," who was given a letter of reprimand on January 11, 2K01, for trying to get "Input" into a racially motivated work schedule. See Appendix C., P. 34., and Appellant's Reply Brief for 03-1967; Appendix, "Plaintiff's Exhibits #342 & 345," PP. 20 & 23.

7. Pro Se Plaintiff, for example, sought relief on authority of the Federal Rules of Civil Procedure, Rule 9.; and, Title 42 U.S.C., §§ 1981 & 1983. See Complaint for . . ., 02-0595; PP. 1 and 3.

8. The District Court denied relief on the claimed that Pro Se Plaintiff failed to stated a federal authority in which relief can be granted. See Appendix C., PP. 52-3.

9. The Seventh Court affirmed, saying: (1) Pro Se Plaintiff failed to produce any evidence of "Fraud," and (2) the Defendants are not "State Actors;" therefore, Title 42 U. S. C., § 1983 does not apply. Ibid., C., PP. 5.

Other relevant evidence:

1. On P. 4 of its "Order" of July 24, 2K03, the Seventh Court listed ten different acts

against the Plaintiff that denied him work place equality.

2. The above acts deal with: (1) the Defendants' use of "Race" and "Sex" to determine the Plaintiff's pay; (2) different certification standards for "Whites," and "Blacks;" (3) shunning Pro Se Plaintiff; (4) unequal work loads against the Plaintiff; (5) pretextual access to personnel records; (6) racially motivated work schedules, to include "Input;" (7) working the Plaintiff without pay, "Involuntary Servitude;" (8) retaliatory restrictions on use of E-mail; (9) the denial of the Defendants' internal complaint procedure to Pro Se Plaintiff; and, (10) the Defendants' expressed intent to work the Plaintiff when he is sick. Ibid.

3. The Seventh Court maintained that none of the above acts are adverse to the Plaintiff. Ibid., P. 6., for example.

Defendants as "State Actors:"

1. On January 30, 1994, the City of Indianapolis, Indiana decided to privatize its two wastewater treatment plants: Belmont and Southport; and, the Defendants were awarded the contract. See Appellant's Reply Brief, Appendix "Defendants' Statement Of Material Facts Not In Dispute;" P. 30. Also see Appendix C., P. 25.

2. As a contractor, and like the Indianapolis Department of Public Works, the Defendants continued such duties as: (1) meeting discharge limits; (2) filed discharge reports with

Indianapolis, and the State of Indiana; (3) bargained with AFSCME Local #725; (4), maintained the City's "No-Smoking Policy," for example. Ibid.

3. The Defendants do not own the wastewater treatment plants: Belmont and Southport; they have not leased the related building, equipment, and land; the Defendants simply operate and manage Belmont and Southport - like the Indianapolis Department of Public Works prviously did. Ibid.

4. In its "Order" for July 24, 2K03, the Seventh Court affirmed the District Court's determination that the Defendants are not "State Actors," and denied Plaintiff's claims under Title 42, U. S. C., § 1983. Ibid., A., P. 5.

Seventh Court's sanctions:

1. On July 24, 2K03, the Seventh Court ignored all the above, and declared that the Plaintiff's appeals are "frivolous." Ibid., P. 5.

2. The Seventh Court, at the request of the Defendants, sanctioned Pro Se Plaintiff $2,500.00, and proposed additional sanctions, which include preventing the Plaintiff from filing any papers with the Seventh Court for a two-year period. Ibid., P. 7-8. Also see Appellees' Brief for 03-1967, PP. 14-15 & 41.

3. The Seventh Court also wrote the following: Ibid., P. 8:

> Pursuant to the notice and opportunity requirement set forth in Fed. R. App. P. 38 and Cir. R. 38, Gaines has fourteen (14) days from the filing date of this order to file with the court his written reasons opposing the above proposed order. Failure to respond shall result in automatic imposition of the proposed sanction.

4. Using Certified Mail, 7002-2410-0007-8918-1291, Pro Se Plaintiff timely mailed the following on August 6, 2K03, at 10:38 a.m., to the Seventh Court: (1) an introductory letter; (2) Money Order #002-814-469 for $2,500.00; and, (3) 30 copies of Appellant's Petition For En Banc Hearing On Rule 38 Sanctions.

5. The Plaintiff's "Return Receipt" shows that the Office of Clerk for the Seventh Court received the above package on August 11, 2K03.

6. Since the time of August 11, 2K03, the Docket Sheets for . . . 02-4289 & 03-1967 do not reflect the above filing and/or the $2,500.00 payment, which were timely mailed. See ¶ 4., above.

7. The Docket Sheets, by comparison, reflect all the Defendants' filings for cases 02-4289 & 03-1967. See referenced Docket Sheets.

8. All the litigation that have come before the federal court, under *Gaines v. White River* Environmental Partnership, et al., have been provoked by the Defendants. See P. 1.

Administrative procedure:

1. EEOC currently uses "Form 5," for the charging party to state a complaint. See Appellant Brief for 03-1967, Appendix; P. 44, for example, which features EEOC Charge #240-A12-457, dated August 6, 2K01..

2. In the "Name" block or space for identifying a "Respondent," the EEOC representative wrote "White River Environmental," and nothing more, because there was not enough remaining space to write the names of the reaining "Respondents." Note that the word, "Partnership" was even omitted, for spacial reasons. Ibid.

3. The District Court rejected the above reasoning in ¶ 2. See Appendix C., PP. 41-2.

4. When each suit was filed in a district court, the names of the "Respondents," to include "Managers" were listed. See Appellant's Brief for 03-1967, PP. 1-2, for example.

5. In its "Order" for July 24, 2K03, the Seventh Court denied relief by writing the following. See Appendix A., P. 5:

> As to Gaines' remaining discrimination claims, the court dismissed them as to all defendants except White River because only White River was named as the respondent in any of Gaines' EEOC charges.

ARGUMENT

Summary: On the one hand, the Defendants have consistently provoked litigation in the area of "Equal Employment Opportunity." On the other hand, the Defendants have been able to: (1) escape all punishment; and, (2) used the Lower Courts to sanction Pro Se Plaintiff for trying to defend himself against the Defendants. Through the use of "Double-Standards" or "Inconsistencies," the Lower Courts have denied the Plaintiff due process, and equal protection of the law. The Plaintiff's Summary Judgment Motion has been denied in error; he has been severely sanctioned in error, - and the review of the Supreme Court is needed, so that: (1) the above errors will not be allowed to stand against the Plaintiff; (2) the Lower Courts will be more able to enter decisions that are more "Consistent" with those of the Supreme Court, and the intent of Congress.

I. The Lower Courts Have Use A System Of "Double-Standards" To Deny Pro Se Plaintiff Due Process & Equal Protection Of The Law

A. Legal standards

1. United States Constitution, the Fifth and Eighth Amendments; Title 29, U.S.C., 623(a) & 623(d); Title 42, U.S.C., §§ 1981, 2000e-2(a), 2000e-2(k)(c)(2), 2000e-2(m), and 2000e-3(a); the Federal Rules of: (1) Appellant Procedure, Rules 35 & 38; (2) Civil Procedure, Rule 56; and, (3) Evidence, Rule 406. See Appendix E., PP. 73-79.

2. Court cases:

Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505; 1986:

> 2. Federal Civil Procedure
>
> Substantive law will identify which facts are material for purpose of summary judgment, as only disputes over facts that might affect the outcome of suit under the governing law will properly preclude the entry of summary judgment; factual disputes that are irrelevant or unnecessary will not be counted. Federal Rules Civ. Proc. Rule 56(c), 28 U. S. C. A.

Harris v. Forklift Systems, Inc., 126 L Ed 2d 295; 1993:

> Civil Rights § 7.6, 7.7
>
> . . . ; Title VII comes into play, however, before the harassing conduct leads to a nervous breakdown, and (2) . . . , the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion or national origin offends Title VII's broad rule of workplace equality.

Gilbert v. Homar,
138 L Ed 2d 120, 121; 1997:

> Constitutional Law
>
> 4. Due process is not a technical conception with a fixed content unrelated to time, place, and circumstances; rather, it is flexible and calls for such procedural protection as the particular situation demands.

B. Argument: examples of judicial double-standards that wrongfully favor the Defendants, and wrongfully affected the outcome: (1) see "Motions to amend and summary judgments, PP. 4-7; (2) see "Time enlargements & summary judgments, PP. 7-9; (3) see "Affidavits & summary judgments, PP. 9-11; (4) see "Disputed material facts," PP. 11-13; (5) see "Conspiracy and fraud," PP. 13-15; (6) see "Other relevant evidence," PP. 15-16. On the one hand, the Plaintiff has been, and continues to be, denied "Work Place Equality." On the other hand, the Plaintiff has been denied the constitutional right to a "Fair Judicial Procedure," which serves the interest of the Defendants. These injustices cannot be allowed to stand.

II. When Indianapolis Hired The Defendants To Manage & Operate Its Wastewater Treatment Plants - The Defendants Became "State Actors"

A. Legal standards

1. Title 42, U. S. C., § 1983, and the Federal Rules of Evidence, Rule 406. See Appendix E., PP. 75 & 79.

2. Court cases:

Shirley v. State National Bank Of Connecticut, 493 F. 2d 739, 740; 1974:

> 2. Civil Rights
>
> Within meaning of civil rights statue a private person may act under color of law. 42 U. S. C. A., § 1983.

Reeves v. Sanderson Plumbing Products, Inc., 147 L Ed 2d 105, 110; 2001:

> Civil Rights § 7.5 - employment
>
> 12. The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.

Brentwood Academy v. Tennessee Secondary School Athletic Association, et al., 148 L Ed 2d 807, 807, 810-11; 2001:

> Decision: Tennessee state association

incorporated to regulate athletic competition among state's public and private secondary schools held to be state actor for purpose of Federal Constitution's Fourteenth Amendment. P. 807.

Civil Rights § 26 . . . ,

5a, 5b. If a defendant's conduct satisfies the state-action requirement of the Federal Constitution's Fourteenth Amendment, then the conduct also constitutes action under color of state law for purpose of 42 U S C S § 1983. P. 810.

Constitutional Law § 520 . . .

11. Government coercion or encouragement may, under some circumstances, justify characterizing an obtensibly private action as public instead, for purpose of the Federal Constitution's Fourteenth Amendment. Ibid., P. 811.

McCormick v. City of Chicago, 30 F. 3d 319 (7th Cir. 2000)

5. Federal Civil Procedure

Pro se complaints are to be liberally construed and not held to the stringent standards expected of pleadings drafted by lawyers.

Curtis 1000, Inc., v. Suess,
24 F.3d 941 (7th Cir. 1994)

3. Torts

Tort of intentional interference with advantageous business relations no longer requires that relation interferred with be one emboided in formal contract.

Kolstad v. American Dental Ass'n,
119 S. Ct. 2118, 2119; 1999:

6. Damages

Egregious or outrageous acts may serve as evidence supporting inference of evil motive required to impose punitive damages.

B. Agrument: One, a fair review of the evidence showns that the Defendants are "State Actors," which includes their ability to affect commerce. See "Defendants as 'State Actors,'" PP. 16-7. Two, the Defendants have: (1) conspired and committed fraud against the Plaintiff; (2) willfully provoked litigation in the federal courts; (3) caused Pro Se Plaintiff to suffer an "Irreparable Injury;" and, (4) sought and received severe sanctions against the Plaintiff. Three, having willfully engaged in the foregoing acts - the Defendants now hope to escape all financial responsibility to the Plaintiff, by claiming that they are <u>not</u> "State Actors." or

such a claim is being made, in their behalf, by the "Lower Courts." Ibid. Also see PP. 1-19.

III. The Seventh Court Has Sanctioned Pro Se Plaintiff In "Bad Faith"

A. Legal standards

1. See "Legal standards," P. 20.

2. See these previously cited court cases: *Gilbert v. Homar,* P. 22; *Reeves v. Sanderson Plumbing Products, Inc.,* P. 23; and, *McCormick v. City of Chicago,* P. 24.

B. Argument: One, the "Lower Courts" look to the Defendants for legal guidance, instead of looking to the Supreme Court for the same, or following the intent of Congress - as it applies to this case. See PP. 17-20, for example. Also see "Entry" on PP. 5-6. Two, the Seventh Court's sanction represents another "Double-Standard" against the Plaintiff, which cannot be allowed to stand.

IV. EEOC "Form 5" Should Be Revised Or Declared "Unconstitutional," And All The Defendants Named In The Complaint Should Be Retained, To Include "Managers"

A. Legal standards.

1. See relevant legal authority, P. 20.

2. See *Anderson v. Liberty Lobby, Inc.*, P. 21, and *Gilbert v. Homar.*, P. 22; and, *McCormick v. City of Chicago,* PP. 24-5.

B. Argument: One, in its present form, EEOC "Form 5" is unlawfully bias towards employers, because the space for identifying the "Name" of an employer is so small that it discourages or prevents the naming of more than one or two "Respondents." Two, even though the Seventh Court has said that "Pro Se complaints are to be liberally construed," this standard was contradicted by the Lower Courts - when they dismissed the names of "Defendants" that did not appear in the "Name" box on EEOC "Form 5." Three, the "Lower Courts" have acted in bad faith, or in error; or, EEOC "Form 5" is in error. See Administrative Procedure, P. 19.

V. Since The Defendants Have Provoked All Ligitation, And Since The Seventh Court Has Sanctioned Pro Se Plaintiff $3,600.00 In "Bad Faith;" The Plaintiff Is All The More Entitled To Be Paid For An "Irreparable Injury" That The Defendants Willfully Caused

A. Legal standards:

1. See relevant "Legal Standards" on P. 1.

2. See relevant courts cases; PP. 21-26.

B. Argument: One, the Plaintiff is entitled

to "Equal Employment Opportunity." Two, based on the Plaintiff's opposition to the Defendants' unlawful employment practices - the Defendants caused the Plaintiff to suffer an on-the-job, "Irreparable Injury," on June 2, 1999, while he was actively engaged in "Discovery." Three, the Plaintiff is entitled to be paid, too! See PP. 4-20.

VI. The Defendants Have Engaged In Conspiracy, And Fraud Against Pro Se Plaintiff

A. Legal standards

1. See Title 42 U.S.C § 623(d); Title 42 U. S.-C., §§ 1981, 1981(c), 1983, 2000e-2(a); and, 20003-3(a); the Federal Rules of Civil Procedure, Rule 9b; and, the Federal Rules of Evidence, Rule 406. See Appendix E., PP. 74-80.

2. Also see these court cases: (1) *Anderson v. Liberty Lobby, Inc.*, P. 21; *Reeves v. Sanderson Plumbing Products, Ind.*, P. 23; *McCormick v. City of Chicago*, P. 24; *Curtis 1000, Inc., v. Suess*, P. 25; and, *Kolstad v. American Dental Ass'n*, P. 25.

B. Argument: One, see PP. 13-15; PP. 16-17; and, PP. 17-19. Two, the Defendants' "Conspiracy & Fraud" against Pro Se Plaintiff have denied him equal employment opportunity, and subjected him severe sanctions before the Seventh Court. These injustices against the Plaintiff cannot be allowed to stand!

Conclusion

The "Material Facts" in this case fairly and sufficiently show that: (1) Pro Se Plaintiff has been denied "Equal Employment Opportunity;" (2) the right to a "Fair Judicial Procedure;" and, (3) the review of the Supreme Court is needed, in order to prevent the foregoing injustices from standing against Pro Se Plaintiff. Therefore, and on the foregoing authority, as stated on PP. 20-28; grant the following relief: (1) reverse the summary judgment for the Defendants; (2) declare the Defendants to be "State Actors;" (3) direct the Seventh Court to return $3,600.00 to the Plaintiff, which were wrongfully paid as fines; (4) award the requested monetary damages against each Defendant and "Manager" that are named in the suit; (5) declare EEOC "Form 5" to be unconstitutional, or direct EEOC to revise it, so that all the names of the "Respondents" can be readily listed; and, (6) award the Plaintiff fair monetary damages for an "Irreparable Injury" that the Defendants have previously and willfully caused him to needlessly suffer!

Sincerely,

LOUIS F. GAINES, October 13, 2K03
Pro Se

APPENDIX

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APPENDIX A: Seventh Court's Order

UNITED STATES COURT OF APPEALS

For The Seventh Circuit
Chicago, Illinois 60604

Submitted June 24, 2003
Decided July 24, 2003

Before

Hon. W. J. BAUER, Circuit Judge

Hon. J. L. COFFEY, Circuit Judge

Hon. D. A. MANION, Circuit Judge

LOUIS F. GAINES, Plaintiff-Appellant, No. 02-4289	v.	] Appeal from the] United States Dis-] trict Court for the] Southern District] of Indiana, India-
WHITE RIVER ENVIRON- MENTAL PARTNER- SHIP, Defendant-Appellee.		] napolis Division.] No. 02 C 1524] David F. Hamil-] ton, Judge
LOUIS F. GAINES, Plaintiff-Appellant, No. 03-1967	v.	] Appeal from the] United States Dis-] trict Court for the] Southern District] of Indiana, India-
WHITE RIVER ENVIRON- MENTAL PARTNERSHIP,		] napolis Division.

IWC RESOURCES CORPORATION, SUEZ, et al., Defendants-Appellees.] No. 02 C 595

] John D. Tinder, Judge.

ORDER

The following are before the court:

1. DEFENDANTS-APPELLEES' MOTION TO DISMISS PLAINTIFF-APPELLANTS' APPEAL AS MOOT, filed on May 5, 2003, in No. 02-4289 by counsel.

2. APPELLANT S RESPONSE BRIEF, filed on June 5, 2003, in No. 02-4289 by appellant Louis F. Gaines, proceeding pro se.

Louis Gaines, an African American male in his 50s has a history of suing his employer, appellee White River Environmental Partnership ("White River"), for employment discrimination and retaliation, and then filing frivolous appeals from the district court's order in those cases. See *Gaines v. White River Envtl. P'ship, et al.*, No. 02-3849, 2003 WL 1827209 (7th Cir. 2003) (reviewing Gaines' litigation history). We have admonished Gaines repeatedly to stop filing frivolous appeals and sanctioned him twice for failing to heed our warnings. *Id.* at *3.

These appeals are more of the same; they arise from Gaines' third and fourth lawsuits against White River. In his third lawsuit Gaines

alleged that White River and three other defendants discriminated and retaliated against him in violation of various amendments to the Constitution, 42 U.S.C. §§ 1981 and 1983, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Age Discrimination in Employment Act, 29 U.S.C. § 621. He also asserted claims for "conspiracy" and "fraud." Gaines' com-plaint in the third suit is based on three charges he filed with the Equal Employment Opportunity Commission ("EEOC"). In his EEOC charges Gaines alleged that White River (1) determined its employees' pay based on their race and sex, (2) required Gaines but not Caucasian employees to substantiate that he was certified to perform his job, (3) ordered supervisors to avoid written communication with Gaines due to his pending legal action against White River, (4) assigned him "cleaning duty" more often than Caucasian employees, (5) required him to use personal time to visit the personnel office, (6) refused his requests to change his work schedule while granting Caucasian employees' requests, (7) refused to pay him for "confined space training," (8) restricted his e-mail privileges without adequate explanation, (9) denied his internal EEOC complaints, and (10) expressed willingness to require him to work when he is sick. In the fourth lawsuit, Gaines filed a complaint virtually identical to the one in his third lawsuit, except that it is based on only one of the three charges from that third lawsuit.

The district court dismissed the fourth lawsuit as duplicative and granted summary judgment in favor of the appellees in the third lawsuit. The court concluded that Gaines' claims

in one of his EEOC charges were barred by res judicata because they were disposed of in *Gaines v. White River Envtl. P'ship, et al.*, IP 01-1158-H/K (S.D. Ind. Sept. 30, 2002), aff'd, No. 02-3849, 2003 WL 1827209 (7th Cir. 2003). As to Gaines' remaining discrimination and retaliation claims, the court dismissed them as to all defendants except White River because only White River was named as the respondent in any of Gaines' EEOC charges. As to White River, the court concluded that Gaines failed to establish his prima facie case and presented no evidence of pretext. The court rejected Gaines' conspiracy and fraud claims because he failed to produce a "shred of evidence" that the appellees either agreed

to engage in any illegal activity or made any misrepresentations on which Gaines relied. Finally, the court rejected Gaines' § 1983 claims because none of the appellees are state actors. Gaines appealed in both cases, and we consolidated the appeals for disposition on our own motion.

Gaines' appeals are frivolous. As to Gaines' appeal from the third suit, his brief merely recounts his past litigation against White River, reasserts his claims, and contains a conclusory assertion that the district court unfairly advantaged White River by (1) granting White River extensions of time to respond to Gaines' summary judgment motion while denying Gaines any extensions; and (2) allowing White River to file affidavits while striking those Gaines submitted. Gaines offers no explanation why he thinks the

district court erred in granting extensions or striking his affidavits or how he might have been prejudiced as a result. We have warned Gaines that unsupported arguments will get him nowhere on appeal. *See Gaines,* No. 00-3802, 2001 WL 298592 at *1. Additionally, Gaines fails to identify any error in (or even mention) the district court's order granting summary judgment, which is not surprising given that we have already specifically explained to him why much of the conduct he complaints of is not actionable. *See id.* (allegations relating "to e-mail abuses and to decisions about shift rotations and training sessions" do not constitute adverse employment actions); *Gaines,* No. 02-3849, 2003 WL 1827209 at *3 (explaining that Gaines has no § 1983 claim against White River because White River is not a state actor).

As to Gaines' appeal in the fourth lawsuit, he does not dispute that his complaint was duplicative. Instead, he argues that he had to file it because the district court refused to allow him to amend his complaint in the third lawsuit when the EEOC issued a right-to-sue notice on one of the charges in that complaint. This contention is devoid of merit. A district court's denial of a motion to amend, even if erroneous, does not justify the filing of the proposed amendment as a new lawsuit. And we note that the record shows that the district court denied Gaines leave to amend because he requested it before the EEOC issued the right-to-sue notice and without identifying any new claims to be added. After the EEOC issued the notice, Gaines never renewed his request to amend.

In short, Gaines has completely disregarded our prior sanctions and repeated warnings in pursing this appeals, which serve only to rehash his failed claims and waste this court's valuable resources. Accordingly, the district court's orders are AFFIRMED, and Gaines is sanctioned for filing frivolous appeals in the amount of $2,500.00 payable to the clerk of this court within 14 days of this order. Additionally, because our prior warnings and sanctions have been ineffective to deter Gaines from frivolous filings, we propose to the following order:

Louis Gaines, individually, with others, or through a representative, is prohibited from filing any papers in this court, excluding criminal and habeas corpus proceedings; until the following requirements are met: Gaines must file a "Motion Pursuant to Court Order Seeking Leave to File" and attach

(a) a copy of the proposed paper to be filed;

(b) a copy of this order;

(c) proof of payment of the $2,500.00 sanction imposed by this court in case Nos. 02-4289 and 03-1967 in the form of a copy of a certified check or money order, a signed receipt for the check or money order by the proper recipient, and a sworn affidavit by Gaines that full payment has been made;

(d) and a sworn affidavit by Louis Gaines certifying that the matters raised in the proposed

filing are not frivolous and have not been raised by him in prior suits.

Gaines is authorized to submit to this court, no earlier than two years from the date of this order, a motion to modify or rescind the order. If Gaines disregards the order we enter today, he will be subject to contempt charges.

Pursuant to the notice and opportunity requirement set forth in Fed. R. App. P. 38 and Cir. R. 38, Gaines has fourteen (14) days from the filing date of this order to file with the court his written reasons opposing the above proposed order. Failure to respond shall result in automatic imposition of the proposed sanction. *See Verdone v. Circuit Court of Taylor County,* 73 F.3d 669, 674-75 (7th Cir. 1995) (imposing substantially identical sanctions on appellant for repeatedly filing of frivolous appeals); see also *Perry v. Pogemiller;* 16 F.3d 138, 140 (7th Cir. 1993) ("[F]ederal courts possess the inherent power and constitutional obligation to prevent abuse of the judicial process by a litigant who engages in a pattern of frivolous litigation.").

Finally, White River advises us that Gaines filed yet another lawsuit against it on May 16, 2003, case No. 03 CV 723. White River is DIRECTED to provide a copy of this order to the district court in that case. White River's motion to dismiss in case No. 02-4289 is DENIED as moot.

APPENDIX B: District Court (... 1524)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

LOUIS F. GAINES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:02-cv-1524-DFH
	)	
WHITE RIVER ENVIRONMENTAL PARTNERSHIP, et al.,	)	
	)	
Defendants.	)	

ENTRY

"As part of its general power to administer its docket, a district court may stay or dismiss a suit that is duplicative of another federal court suit." *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000). The claims asserted in this action are or could be asserted in *Gaines v. White River Environmental Partnership, et al.*, No. IP 02-595-C-T/K. Accordingly, the defendants' motion to dismiss is granted insofar as based on the argument that this duplicative action should not be permitted to proceed. The court does not reach any of the other arguments presented by the defendants in their motion to dismiss.

Judgment dismissing this action without prejudice

shall now issue.

So ordered.

S / DAVID F. HAMILTON, Judge
United States District Court

Date: 11/27/02

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

LOUIS F. GAINES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:02-cv-1524-DFH
	)	
WHITE RIVER ENVIRONMENTAL PARTNERSHIP, et al.,	)	

JUDGMENT

This court, having this day made its Entry,

IT IS NOW ADJUDGED that this cause of action is dismissed without prejudice.

S / DAVID F. HAMILTON, Judge
United States District Court

Date: 11/27/02

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APPENDIX C: District Court (... 0595)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

LOUIS F. GAINES,	)	
Plaintiff	)	
	)	
v.	)	IP 02-595-T/K
WHITE RIVER ENVI-RONMENTAL PART-NERSHIP, et al.,	)	
	)	
Defendants	)	

ENTRY DISCUSSING SELECTED PENDING MOTIONS

I.

The defendants' motion to extend deadline, Filed on August 30, 2002, is granted. This means that the defendants' filing of September 3, 2002, is deemed to be a timely response to the plaintiff's motion for summary judgment.

II.

A.

The court has considered the following motions to strike, filed by the defendants.

Motion to strike answer affidavit to defendants' motion for summary judgment, filed December 24, 2002.

Motion to strike plaintiff's response affidavit to the affidavits of C. Hedge and G. Suever, filed January 3, 2003.

Motion to strike plaintiff's response affidavit to the affidavit of Pam Wolsiefer-Leak, filed January 17, 2003.

Motion to strike plaintiff's response affidavit to the affidavit of George Russell, filed February 19, 2003.

Motion to strike plaintiff's response affidavit of Rick Farnham, filed March 10, 2003.

B.

The motions to strike itemized in part II. A. of this Entry are granted. The reasons for this ruling are these.

First, the affidavits to which the above motions are directed were not timely submitted in relation to the briefing of the cross-motion for summary judgment, yet as noted in *Spears v. City of Indianapolis,* 74 F.3d 153, 157 (7th Cir. 1996): "We live in a world of deadlines ... A good judge sets deadlines, and the judge has a right to assume that the deadlines were honored. The flow of cases through a busy district court is aided, not hindered, by adherence to deadlines." Materials submitted after the expiration of a deadline need

not be considered. *Gonzalez v. Ingersoll Milling Machine Company,* 133 F.3d 1025, 1030 (7th Cir. 1998); *Lac Du Fambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse - Wisconsin, Inc.,* 991 F.2d 1249, 1257 (7th Cir. 1993) ("[A] decision to disregard all materials submitted after a reasonable filing deadline is certainly not an abuse of discretion because it allows the district court to preserve the moving party's right to respond to the resisting party's argument and to decide the summary judgment motion in a timely fashion.") (citation omitted).

Second, those affidavits are insufficient under Rule 56(e) insofar as they rest on speculation, insofar as they present matters outside the issues in this action, insofar as they are not based on Mr. Gaines' personal knowledge, and insofar as they present legal conclusion, rather than facts. *Cusson-Cobb v. O'Lessker,* 953 F.2d 1079, 1081 (7th Cir. 1992); *Pfeil v. Rogers,* 757 F.2d 850, 862 (7th Cir. 1985), cert. denied, 475 U.S. 1107 (1986).

C.

The defendants' motion to strike filed on December 3, 2002, directed to the plaintiff's response to the defendants' motion for summary judgment, is denied with respect to the issue of the timing of that response and is granted to the extent that the court will not consider material in that response which do not satisfy the requirements of Rule 56(e).

III.

The defendants' motion to strike filed on September 25, 2002, is granted to the extent that plaintiff's affidavit of September 10, 2002, to which the motion to strike filed on September 25, 2002, is directed, is insufficient under Rule 56(e) because it rests on speculation, it presents matters outside the issues in this action, and it presents legal conclusions, rather than facts. The defendants' request to strike the affidavit of September 10, 2002, in its entirety based on its assertedly scandalous content is denied.

IT IS SO ORDERED.

S / JOHN D. TINDER, Judge
United States District Court

Date: 3/14/2003

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

LOUIS F. GAINES,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP 02-595-T/K
	)	
WHITE RIVER ENVIRONMENTAL PARTNERSHIP, et al.,	)	
	)	
Defendants.	)	

ENTRY DISCUSSING ADDITIONAL SELECTED PENDING MOTIONS

I.

Plaintiff Gaines' motion for a favorable summary judgment, or for appropriate summary judgment relief against the defendants and a supporting affidavit, both filed on July 29, 2002, recites that he was asked to work overtime on June 27, 2002, and on July 10, 2002. Gaines contends that these requests to have him work overtime were a pretext to endanger him by having him work a 16-hour day.

On August 16, 2002, the defendants filed a motion to strike Gaines filing of July 29, 2002, on the basis that Gaines objection to overtime fails to state a claim, that through his objection he attempts to improperly add a claim without obtaining leave to amend his complaint, and that such an additional claim would in any event be legally insufficient because, to the extent based on Title VII of the Civil Rights Act of 1964 or the Age Discrimination in Employment Act, Gaines failed to exhaust his administrative remedies. The court finds that each basis for the defendants' motion to strike has merit. Accordingly, the plaintiff's motion for a favorable summary judgment, or for appropriate summary judgment relief against the defendants, filed on July 29, 2002, is denied, the defendants' motion to strike filed on August 16, 2002, is granted, and no claim relating to Gaines assigned or asked to work overtime in July or July 2002 shall be considered part of this action.

II.

On August 8, 2002, Gaines filed a motion for appropriate summary judgment relief, and an affidavit in support. Through this motion and affidavit, Gaines seeks to add claims of alleged acts of evasiveness and retaliation. These allegations are the following: in January 2002, he want not required to attend weekly meetings that only white managers attended; he was forced to work sixteen hours days on July 28, 2002, and August 5, 2002; on August 5, 2002, he came to work eight hours earlier than normal thinking he was supposed to work a sixteen hour day, not

knowing that the work schedule had been changed, forcing him to go home and return to work eight hours later; he did not receive a prompt response to his inquiry whether the bereavement leave policy applied to daughter-In-laws or son-in-laws, so that he did not know that such leave would in fact be granted until after he took the leave; and in August 2002 he was required to show proof of his wastewater treatment plant operator certification, when such a requirement was not enforced against white operators.

On August 28, 2002, defendants filed a motion to strike the August 8, 2002, motion and affidavit. The defendants argue that Gaines improperly attempting to expand the claims in this action, contrary to the court's statement in the Entry of July 9, 2002, that "the parties are free to seek summary judgment as to the claims or defenses which are presented by the pleadings, but are not free to use the summary judgment process as a substitute for actual pleadings in order to modify the claims or defenses in the case." Defendants argue that the claims that Gaines has been required to provide proof of his certification was asserted in *Gaines v. White River Environmental Partnership, et al.*, IP01-1158-H/K (S.D. Ind. September 30, 2002), and again in this action. Defendants also argue that Gaines has filed to exhaust his administrative remedies with respect to the remaining claims asserted in Gaines' August 8, 2002, motion.

With the exception of the certification claim, none of the allegations asserted in Gaines' August 8, 2002, motion were included with an EEOC

charge of discrimination or retaliation before this action was filed. This circumstance precludes the court from considering such claims. *Cheek v. Western and Southern Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994) ("a Title VII plaintiff cannot bring claims in a lawsuit that were not included in her EEOC charge") (citing *Alexander v. Gardner-Denver Co.*, 415 U. S. 36, 47 (1974)). Even if Gaines had timely filed an EEOC charge concerning these allegations, the court finds that none of these alleged acts subjected Gaines to an adverse employment action, which is a required element of a retaliation claim. *Stone v. City of Indianapolis Public Utilities Div.*, 281 F.3d 640, 644 (7th Cir. 2002). In addition, the certification claim is duplicative of that brought in another lawsuit and will not be relitigated here. The plaintiff's motion for appropriate summary judgment relief, filed on August 8, 2002, is denied, and the defendants' motion to strike plaintiff's motion for appropriate summary judgment relief and plaintiff's affidavit in support, filed on August 28, 2002, is granted.

III.

The plaintiff's motion for a favorable summary judgment as a matter of law, or grant other appropriate and fair relief, filed on September 10, 2002, seeks relief based, in part, on his contention that the defendants' motion for summary judgment, filed on September 3, 2002, was not timely filed. In light of the court's ruling in Part I of the Entry Discussing Selected Pending Motions issued on March 14, 2003, finding that "the defendants' filing on September 3, 2002, is

deemed to be a timely response to the plaintiff's motion for summary judgment," and because the court finds that no other relief sought by the plaintiff through his September 10, 2002, motion, is warranted, that motion is denied.

IT IS SO ORDERED.

S / JOHN D. TINDER, Judge
United States District Court

Date: 3/26/2003

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

LOUIS F. GAINES,	)	
	)	
Plaintiff	)	
	)	
vs.	)	IP 02-595-T/K
	)	
WHITE RIVER ENVIRONMENTAL PARTNERSHIP, et al.,	)	
	)	
Defendants		

ENTRY DISCUSSING CROSS MOTIONS FOR SUMMARY JUDGMENT AND DIRECTING ENTRY OF FINAL JUDGMENT

For the reasons explained in this Entry, the plaintiff's many claims in this action for employment discrimination do not survive the defendants' motion for summary judgment, which must be granted, and the plaintiff's own motion for summary judgment must be denied.

I. Background

A. Parties

The plaintiff in this action is Louis Gaines,

who has been employed for many years by the White River Environment Partnership ("WREP"), who operates water treatment facilities in Marion County Indiana.

The defendants are WREP and its individual partners, those being IWC Resources, United Water Services and Lyonnaise American Holding, a wholly-owned U.S. subsidiary of Suez Lyonnaise Des Eaux.

B. Claims

Gaines' complaint, filed on April 19, 2002, asserts claims pursuant to various provision of the United States Constitution, those being the First, Fifth, Eighth, and Thirteenth Amendments. He also alleges a claim for "conspiracy" and "fraud." His statutory claims are brought pursuant to the (1) the Age Discrimination in Employment Act ("ADEA"), (2) Title VII of the Civil Rights Act of 1964 ("Title VII"), (3) 42 U.S.C § 1981, and § 1983.

Gaines seeks 2 million dollars in punitive damages from each of the four defendants, and 10 thousand dollars from each of four individuals who are described as "managers," but who are not named as defendants.

C. Procedural Posture

After Gaines' complaint was filed, the defendants appeared and filed their answer. Some effort was made to expand the claims in the case, but the effort was never formalized and hence was not effective. Various non-disposive motions

have been resolved through separate rulings.

All parties have now moved for summary judgment, and those motions are ripe for ruling. See *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 255 (1986). The purpose of Rule 56 is to "enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990). Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A "material fact" is one that "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Factual disputes are 'genuine' only 'if the evidence is such that a reasonable jury could return a verdict for the [nonmovant]." *Oest v. Illinois Dep't of Corrections*, 240 F.3d 605, 610 (7th Cir. 2001) (quoting Anderson, 477 U.S. at 248)*

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* Through the process described above, "summary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to that." *Crawford - El v. Britton*, 523 U.S. 574, 600 (1998). Although the moving party must initially identify the basis for its contention that no genuine issue of material facts exists, the

nonmoving party cannot rest on his pleadings, but must produce his own evidence. *Hughes v. Joilet Correctional Ctr.*, 931 F.2d 425, 428 (7th Cir. 1991). The burden is therefore on the non-movant to set forth "specific facts showing that there is a genuine issue for trial." *Eiland v. Trinity Hosp.*, 150 F.3d 747, 750 (7th Cir. 1998) (quoting Fed. R. Civ. P. 56(e)).

Because the defendants seek the entry of summary judgment, and because Gaines is proceeding wihout counsel, the notice required by *Lewis v. Faulkner*, 689 F.2d 100 (7th Cir. 1982), and by Local Rule 56.1, was issued. Through this notice, Gaines was notified of the nature of the motion for summary judgment, the proper manner in which to respond, and the consequences of failing to respond. This information assures that Gaines' claims receive the fair and meaningful consideration to which they are entitled, within the scope of applicable rules of procedure and, of course, the substantive law. Gaines has responded to the defendants' motion with a discusion of his claims and with a submission of numerous documents.

The court notes that a substantial portion of material presented by Gaines in support of his motion for summary judgment relates to background information and to claims asserted in two prior lawsuits brought against WREP. Even if some of these matters could be thought to be disputed, such a dispute over irrelevant or unnecessary facts does not preclude summary judgment. See *Hardin v. S.C. Johnson & Son, Inc.*, 167 F.3d 340, 344 (7th Cir. 1999). Facts are taken from the evidentiary record here only insofar as they are "material" as determined by the substantive law. See *McGinn v. Burlington*

Northern R.R., 102 F.3d 295, 299 (7th Cir. 1996).

D. Material Facts

On the basis of the pleadings and the expanded record, and specifically on the portions of that record which comply with the requirements of Rule 56(e) for admissible evidence, the following facts are undisputed for the purposes of the cross-motions for summary judgment.

1. In 1994, WREP began operating Indianapolis' Advanced Wastewater Treatment System (the "Plant"). The Plant has two facilities: Belmont and Southport.

2. Gaines has been employed by WREP as an Operation Specialist in the Operation Department since January 30, 1994.

The New 2001 Shift Schedule

3. WREP management maintains final authority, at all times, to direct the work of the Operation Specialists and set their work schedules.

4. In December, 2000, Operation Manager George Russell ("Russell") had to devise a method to rank all Operations Specialists to determine the bidding order on the new shift that would go into effect in January, 2001. Russell's task was

complicated by the fact that many of the current Operations Specialists' job descriptions did not become effective until December, 1995.

5. The method Russell developed in December, 2000, to determine shift bidding order for the Operations Specialists' new schedule involved first ranking all Operations Specialist based upon their time in the position since late 1995.

6. In the event that Operation Specialist had the same amount of time in their position since late 1995, Russell used their original date of hire, either with WREP or the City of Indianapolis, as a tie-breaker.

7. On December 22, 2000, Russell announced in an e-mail message to all Operations Specialists that, based on his ranking method, Everette Pate ("Pate") would receive first pick for a schedule, Mike Wood ("Wood") was second and Gaines was third out of ten Operation Specialists.

8. On January 1 and 2, 2001, Gaines sent e-mail messages to multiple individuals asking that WREP review Russell's methods for determining the shift-selection order for violations of the Company's Equal Employment Opportunity Policy.

9. On January 4, 2001, in response to Gaines' complaint, as well as complaints received from other Operations Specialists, Russell put the new shift schedule for Operation Specialist on hold

while he re-evaluated the methods he used for determining seniority.

10. Also on January 4, 2001, Project Manager Pam Wolsiefer-Leak ("Wolsiefer-Leak') sent an e-mail message to Gaines in which she told Gaines that Russell was looking at his request and that there was "no need for anyone else to get involved."

11. On January 5, 2001, Gaines sent an e-mail message to Human Resources Manager Ginny Suever ("Suever"), Wolsiefer-Leak and Supervising Operations and Maintenance Engineer David Hackworth ("Hackworth") requesting that Human Resources Department review Russell's methods for determining seniority to "prevent a conflict of interest." Because Gaines disagreed with the rankings, he refused to select a shift schedule and Russell assigned him one.

Russell's January 2001 Shift Rotation Directive

12. On January 5, 2001, Russell sent an e-mail message to all Operations Specialists informing them that, effective January 8, 2001, the rotation for all Operations Specialists between the Belmont and Southport facilities would be every two weeks.

13. In January 5, 2001 e-mail message regarding the rotation between the Belmont and Southport plants, Russell stated that failure to follow his directive would be considered a Company policy violation for failing to follow a direct order and insubordination.

14. Russell implemented the new rotation policy to ensure that all Operations Specialists gained sufficient experience working at both facilities, which would make the Operations Specialists staff as a whole more versatile and create greater scheduling flexibility.

15. On January 9, 2001, Gaines sent an e-mail message to Russell, Wolsiefer-Leak, Suever and Hackworth questioning the wisdom of Russell's decision to place all Operations Specialists on a two-week rotation between the Belmont and Southport facilities.

Gaines' January 2001 Disciplinary Action Report For Insubordination

16. On January 10, 2001, in response to Gaines' January 9 e-mail message, Russell sent an e-mail message to Gaines informing him that the rotation schedule provides an equal rotation for all Operation Specialists and that Gaines' continued questioning of Company directives constituted insubordination.

17. Sometime on or about January 10, 2001, after Russell had determined that Gaines' e-mail messages of January 5 and January 9, 2001 constituded acts of insubordination, he discussed the the appropriate disciplinary response with Hackworth, Wolsiefer-Leak and Suever.

18. Hackworth, Wolsiefer-Leak and Suer ver agreed with Russell that Gaines' conduct

constituted insubordination and agreed a Disciplinary Action Report was an appropriate response.

19. On January 11, 2001, Russell issued Gaines a Disciplinary Action Report for insubordination.

20. The January 11, 2001 Disciplinary Action Report was issued because (1) Gaines continued to make requests for a review of Russell's seniority determinations after Wolsiefer-Leak informed Gaines that Russell was reviewing the matter; and (2) Gaines questioned Russell's decision concerning the rotation schedule between the Belmont and Southport facilities.

21. Russell stated in the January 11, 2001, Disciplinary Action Report that Gaines' e-mail of January 5, 2001 was an "incident of insubordination and behavior deemed offensive or contrary to the best interest of the Company" because Gaines "was aware that further review was being done [on the method used to determine shift-selection order], yet he failed to comply with [Wolsiefer-Leak's January 4] directive and star[ed] making unreasonable demands on others."

22. Russell also stated that Gaines' January 9, 2001, e-mail message was a "challenge" to his own January 5 e-mail message concerning the rotation directive and constituted a second incident of insubordination.

Gaines' Complaint About Cleaning Assignments

23. Under the new shift schedule that was ultimately implemented in January, 2001, all

Operation Specialists were required to work four days a week.

24. The four-day work week was comprised of two 12-hour shifts and two eight-hour shifts.

25. Under that schedule, all Operations Specialists were expected to handle department cleaning duties once every two weeks, and perform four hours of cleaning working during one of the days in which they worked a 12-hour shift.

26. On such days, Operations Specialists would work four hours cleaning, then work an eight-hour shift at the computer console.

27. Under the four-day week schedule, the shift supervisors were charged with the task of making sure that the Operations Specialists performed the cleaning work.

28. The shift supervisors used their discretion when determining how the cleaning work was to be performed and completed.

29. The four-day work week schedule implemented in early 2001 was changed in late 2001 or early 2002.

30. Currently, Operations Specialists work eight hours a day, five days a week. Under the current work schedule, there is no set cleaning schedule.

31. Under the current work schedule, each individual shift supervisor is responsible for making sure that the Operations Specialists complete the cleaning duties as assigned or as needed. Christie Hedges (sic) was Gaines' supervisor, and she did not supervise Operations Specialists Pate, Wood, or Lawson.

32. The job description for Operations Specialists includes general housekeeping duties.

Russell Changes Miller's and Wood's Work Schedules

33. Some in the summer of 2001, Operations Specialist Barbara Miller ("Miller") asked Russell if it was possible for him to change her work schedule.

34. At the time of her request, Miller was working Sundays from 7:00 p.m. to 7:00 a.m., Mondays from 3:00 p.m. to 11:00 p.m., Tuesdays from 3:00 p.m. to 11:00 p.m. and Saturdays from 7:00 p.m. to 7:00 a.m.

35. Miller told Russell that she was having some health problems and found it physically draining to work 12 hours on Sunday and then, just eight hours later, work another eight-hour shift on Monday.

36. After considering her situation and reviewing the schedule, Russell determined that he would accommodate Miller's request by moving her 3:00 p.m. to 11:00 p.m. shift from Mondays to Wednesdays without disrupting the schedule of other Operations Specialists.

37. Russell modified Wood's work schedule several times in 2001 so that Wood could assist with employee training.

38. The modifications to Wood's schedule were made at Russell's request.

39. When Russell changed the schedules of Miller and Wood, he did not issue either of them a Disciplinary Action Report because he did not consider their conduct to be insubordinate.

Gaines' Complaints About Using "Personal Time" to Visit the Human Resources Office

40. All employees working shifts at the Belmont and Southport facilities during hours when the Human Resources office is closed must visit the Human Resources office on their own, unpaid time if they have business that requires them to make an in-person visit.

41. After January, 2001, shift schedule was implemented, Gaines worked Tuesdays from 7:00 p.m. to 7:00 a.m., Wednesdays from 11:00 p.m. to 7:00 a.m., Thursdays from 7:00 p.m. to 7:00 a.m. and Friday from 11:00 p.m. to 7:00 a.m.

42. WREP's Human Resources office is typically open from 8:00 a.m. to 5:00 p.m., Monday through Friday.

43. Because of staffing and budgeting limitations, WREP is unable to open the Human

Resources office before 8:00 a.m. or keep it open much later than 5:00 p.m., Monday through Friday.

44. Operation Specialists Karen Uhlenhake, a white female, and Operations Specialists, James Lawson, a white male, worked schedules comprised largely of 7 p.m. - 7 a.m. and 11 p.m. - 7 a.m. shifts. Uhlenhake and Lawson had to visit the personnel office on their own time if they had business that required an in-person visit.

Gaines' Complaints About Being "Forced" To E-mail More Than Five Employees

45. Sometime in January, 2002, Russell directed all Operations Specialists to prepare a summary of maintenance problems experienced on their respective shifts and e-mail the summary to various department employees.

46. Sometime in January, 2002, Gaines questioned whether Russell's directive on the summary report applied to him because sending the summary would require him to violate an e-mail restriction that had been imposed on Gaines in July, 1997.

47. In response to Gaines' concerns that he was being forced to violate the rule restricting his use of the e-mail system, Russell told Gaines sending the summary of maintenance problems was an exception to that rule and that he was allowed to send the summary by e-mail to the necessary employees.

48. Russell reasoned that the e-mail

restriction did not apply to e-mailing the summary report because such an e-mail was strictly work-related and would not result in numerous uninterested individuals receiving e-mails from Gaines.

49. Sometime later, Gaines sent an e-mail message to Wolsiefer-Leak asking for clarification on Russell's interpretation of the exception to the e-mail restriction.

50. In response to Gaines' e-mail to Wolsiefer-Leak, Russell told Gaines the Company e-mail system was not the proper format to discuss his concerns about the restriction.

51. Russell told Gaines if he had questions about the restriction, he should schedule a meeting so that they could discuss the matter in person. Russell believed an in-person meeting would work best with Gaines because of his history of abusing e-mail privileges.

52. Wolsiefer-Leak did not respond to one of Gaines' e-mail messages seeking clarification on the restriction because she thought Russell was handling the matter.

Gaines' Complaints About Training Pay

53. Under WREP policy, all Operations Department employees are entitled to pay for time spent in mandatory training sessions like 'confined space training."

54. To receive training pay, all employees must mark the date and time of the training at issue on their timecard. The training pay would then be included in the next paycheck.

55. Gaines was not paid for the December 13, 2001 "confined space training" session because he hever submitted a timecard requesting pay.

56. Some months after the session, when Gaines brought the issue to Russell's attention, Russell told Gaines that he would be paid for the training once he submitted the time on his timecard and notified his supervisor of the situation.

WREP's Policies Concerning Pay Raises and Salary Levels

57. Gaines' salary and raise levels were set according to WREP's corporate policy.

58. WREP sets its wage levels for all employee based on corporate guidelines that make no reference to race or sex.

II. Administrative Filing and Prior Litigation

Some of the medley of Gaines' claims are based on charges filed with the Equal Employment Opportunity Commission ("EEOC"). Those charges are identified as numbers 240-A12467, 240A20085, and 240A201230 on page 3 of the complaint.

In EEOC Charge No. 240A12467, dated August 6, 2001, Gaines alleges that he was discriminated against on the basis of race, sex, and age, and in retaliation for filing a previous charge. He alleges that WREP maintains a confidential file where sex and race are used to determine pay rate, that he has been allowed to obtain continuing education credits only at the Belmont plant while a white employee holding the same type of job was allowed to obtain credit while assigned at both Belmont and the Southport plants, and that he has been required to provide proof of certification status while white employees fail to meet certification requirements. He further alleges that one or more supervisors have been informed that Gaines has legal action pending against WREP and that they are to avoid putting statement in writing. The EEOC issued a right to sue notice on Charge No. 240A12467 on January 25, 2002. The court takes judicial notice that this claim was presented and disposed of in *Gaines v. White River Environmental Partnership, et al.*, IP 01-1158-H/K (S. D. Ind. September 30, 2002)

EEOC Charge No. 240A20085, dated October 15, 2001, consists of Gaines' allegations that he was discriminated against by WREP on the basis of race and sex, and in retaliation for having protested a violation of his civil rights. Gaines alleges that in January 2001, the Operation Department of WREP began a new work schedule where assignments was, in part, based on race, which Gaines opposed. After Gaines tried to obtain input into his schedule, Operation Manager George Russell accused Gaines of being insubordinate and issued a letter of reprimand on

January 11, 2001. He further alleges that in August 2001, Ms. B. Miller, a white Operations Specialists, the same job title as held by Gaines, requested a change in her work schedule and the request was granted, and no letter of reprimand was issued. Another white Operations Specialist, Mr. M. Wood, was also granted a different schedule, and no letter of reprimand was issued to him. Gaines alleges that after he opposed the new work schedule in January 2001, WREP imposed the following adverse treatment:

a) WREP required Gaines clean, four hours at a time, on a bi-weekly basis before starting his normal eight hour shift, such cleaning duties having previously been performed by Union personnel;

b) Two white male Operation Specialists, M. Wood and J. Lawson, have been exempted from the four hour cleaning duty "more so than Gaines."

c) Assigned Gaines to working hours which require the full use of personal time, (sic) "Company time," to attend to matters that require a personal visit to the Office of Human Resources, such as reviewing his personnel file;

d) Other Operation Specialists, M. Wood, Ms. Miller, Mr. Pate, Mr. Wallace, Mr. Rodriquez, and Ms. Derringer, were assigned work schedules would allow each of them to review personnel files, for example, on "Company time."

The EEOC issued a right to sue notice in Charge No. 240A20085 on January 25, 2002.

EEOC Change No. 240A201240, dated March 4, 2002, alleges that further acts of retaliation occurred after Gaines filed the two EEOC charges described above in August 2001 and October 2001. The examples cited by Gaines in this charge are that he was denied 1.5 hours of pay when he attended training on December 13, 2001; he, and only he, has been directed not to e-mail more than five employees at once but than on January 18, 2002, Mr. Russell, manager, forced Gaines e-mail more than five employees at once; Wolsiefer-Leak failed to respond to his questions about the e-mail restriction; Gaines was directed not to use e-mail to clarify policy; he was discouraged from using the internal complaint procedure; having denied Gaines pay on December 13, 2001, as of February 7, 2002, management expressed its intent to work Gaines during times of sickness; and EEOC complaints are ignored or always result in findings of "no policy violations," with no statement as to whether that means the conduct complies with company policy. The EEOC had not issued a right to sue notice for Charge No. 240A201240 as of the date Gaines filed his complaint or his motion for summary judgment.

The name of the employer listed on each EEOC complaint is WREP. Gaines did not file EEOC charges against any of the other three defendants in this case, nor did he name as a respondent any individual or entity not named as a defendant.

The scope of Gaines' Title VII and ADEA claims available for resolution in this action is limited by various circumstances.

As a general rule, in a Title VII or ADEA lawsuit, a plaintiff may not sue a party not named as a respondent in an EEOC change. 42 U.S.C. § 2000e-5; 29 U.S.C. § 626(e) ("A civil action may be brought ... against the respondent named in the charge"); *Olsen v. Marshall & IIsley Corp.*, 267 F.3d 597, 604 (7th Cir., 2001); *Perkins v. Silverstein*, 939 F.2d 463, 471 (7th Cir. 1991). The only entity Gaines named as a respondent in his EEOC charge was WREP. Gaines has not argued that any exception to the general rule applies, rather he contends that he did not name the other three defendants because the space on the EEOC form was too small. This explanation is meritless. By not naming the other three defendants, Gaines did not afford them notice of the charges and the opportunity to participate in any administrative proceedings. Accordingly, for purposes of any Title VII and ADEA claims, because IWC Resources, United Water Services and Suez Lyonnaise were not named as respondents, these three defendants must be dismissed.

In addition, Gaines has filed to state a claim upon which relief can be granted against any individual manager of WREP, because they are not Gaines' "employer." See 42 U.S.C. § 2000e(b) (employer" is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceeding year, and any agent of

such a person ...."); *Williams v. Banning*, 72 F.3d 552 (7th Cir. 1995) (individual supervisors cannot held individually liable under Title VII); *Stults v. Conoco., Inc.*, 76 F. 3d 651, 655 (5th Cir. 1996) (ADEA, like Title VII, does not authorize claims against employees as individuals).

The court takes judicial notice that allegations asserted in EEOC Charge No. 240A12467 were resolved in *Gaines v. White River Environmental Partnership, et al.*, IP 01-1158-H/K. "Under the federal common law of res judicata, a subsequent suit is barred if the claim on which it is based arises from the same incident, events, transaction, circumstances, or other factual nebula as a prior suit that had gone to final judgment." *Okoro v. Bohman*, 164 F.3d 1059, 1062 (7th Cir. 1999) (citations omitted. The doctrine of res judicata applies where the following elements are present: (1) a final judgment on the merits in an earlier action, (2) an identity of the cause of action in both the earlier and later suits, and (3) an identity of parties or their privies in the two suits. *Tice v. American Airlines*, 162 F.3d 966, 970 (7th Cir. 1998), *cert. denied*, 527 U.S. 1036 (1999). Any claims that were or could have been brought within the scope of that EEOC charge will not be relitigated in this action.

No right to sue notice was issue for Charge No. 240A201240 until July 2002, after the date Gaines filed his complaint and after Gaines filed his motion for summary judgment. On May 13, 2002, the court denied Gaines' motion to amend his complaint seeking leave to amend his complaint once the right to sue notice was issued, because his motion was filed before the right to

sue notice was issued. Gaines did not seek leave to amend his complaint after receiving the right to sue

notice for Charge No. 240A201240; rather, he filed another lawsuit, *Gaines v. White River Environmental Partnership, et al.*, 1:02-cv-1524-DFH. WREP has addressed Gaines' claims from Charge No. 240A201240 in its motion for summary judgment and has presented a copy of two right to sue notices through an affidavit of Ginny Suever. Moreover, the court notes that *Gaines v. White River Environmental Partnership, et al.*, 1:02-cv-1524-DFH was dismissed on the docket on November 29, 2002, because the "claims asserted in this action are or could be asserted in *Gaines v. White River Environmental Partnership, et al.*, No. IP 02-595-C-T/K." To dismiss the claims now in this action would prevent Gaines from asserting these claims in either action, and a new action would doubtless be untimely under the 90-day rule. 42 U.S.C. § 2000e-5(f)(1); *Threadgill v. More U.S.A., Inc.*, 269 F.3d 848, 849-50 (7th Cir. 2001). Accordingly, Gaines' previous failure to exhaust administrative remedies has been cured and such claims will be addressed on the merits in this action. See *Perkins*, 939 F.2d at 471 (while plaintiff's Title VII claims 'may have been subject to dismissal at any time prior to Perkins' receipt of a right-to-sue letter, the receipt of that letter after the complaint had been filed, but before it had been dismissed, effectively cured the deficiency in the original complaint.")

Accordingly, this leaves for consideration Gaines' race and sex discrimination and retaliation claims which are encompassed in EEOC Charges No. 240A20085 and No. 240A201240.

III. Discussion

A. Title VII Claims of Discrimination

Gaines may prove his discrimination claims (race and sex under Title VII) either by presenting direct evidence or by relying on the indirect, 'burden-shifting" method of proof outlined in *McDonnel Douglas Corp. v. Green,* 411 U.S. 792 (1973), *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981), and *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993). To avert summary judgment in an employment discrimination case, a plaintiff must present either evidence of discriminatory motivation or establish a prima facie case of discrimination under the *McDonnell Douglas* formula. *Sheehan v. Daily Racing Forms, Inc.,* 104 F.3d 940 (7th Cir.), cert. denied, 521 U.S. 1004 (1997).

Direct evidence is evidence which, if believed by the trier of fact, will prove the particular fact in question without reliance upon presumption of inference. *Plair v. E. J. Brach & Sons, Inc.,* 105 F.3d 343,347 (7th Cir. 1997). The direct evidence must show that the defendant said or did something indicating discriminatory animus with regard to the specific employment decision in question. Id.

Gaines has not offered evidence of direct

discrimination.

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Under the alternative method, in *McDonnell Douglas,* the Supreme Court "established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory treatment cases." First, the plaintiff must establish a prima facie case of discrimination. Second, once the prima facie case is established, the defendant must state a legitimate, non-discriminatory reason for the adverse employment action. Finally, if a legitimate, non-discriminatory reason is offered, the plaintiff must come forward to show that the stated reason is not the true one, but only a pretext for discrimination. See *McDonnell Douglas,* 411 U.S. at 802-04; *DeLoach v. Infinity Broadcasting,* 164 F.3d 398, 401 (7th Cir. 1999) (citation omitted).

A prima facie case of discrimination on the basis of race or gender requires Gaines to prove that: 1) he is a member of a protected class; 2) his job performance met his employer's legitimate expectations; 3) he suffered an adverse employment action; and 4) similarly situated employees outside his protected class were treated more favorably. *Brummett v. Lee Enterprises, Inc.,* 284 F.3d 742, 744 (7th Cir. 2002); *Hoffman-Dombrowski v. Arlington Int'l Racecourse, Inc.,* 254 F.3d 644, 650 (7th Cir. 2001)).

The third required element of Gaines' claims of discrimination is that he suffered an adverse

employment action. "[N]ot everything that makes and employee unhappy is an actionable adverse action." *Bell v. Environmental Protection Agency,* 232 F.3d 546, 555 (7th Cir. 2000). "(A] significant change in employment status" is necessary for an employment action to be considered adverse. Id. An adverse change must be material, and "might be indicated by a termination of employment, a demotion evidenced decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Robinovitz v. Pena,* 89 F.3d 482, 488 (7th Cir. 1996) (quoting *Crady v. Liberty Nat'l Bank & Trust Co.,* 993 F.2d 132, 136 (7th Cir. 1993)).

Gaines alleges in EEOC Charge No. 240-A20085 that a work schedule put in place was based on race, that he was written up for opposing the new schedule, that he was required to perform and document cleaning duty more often than two other white male Operations Specialists, and that his work schedule required him to review his personnel file or tend to other human resource matters on personal non-paid time. None of these "constitute [] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth,* 524 U.S., 742, 761 (1998); *Stutler v. Ill. Dep't of Corr.,* 263 F.3d 698, 703 (7th Cir. 2000); *Krause v. City of La Crosse, 246 F.3d 995, 1000*)7th Cir. *2001)* (letter of reprimand alone is not an adverse employment action). In addition, the

undisputed facts show that the new work schedule was not based on race. Rather, it was based on seniority. The four hours of cleaning duty was imposed on all Operation Specialists, and each supervisor used their discretion in determining how the work was to be performed. Other aspects of a prima facie case are not established. For example, the other Operation Specialists to whom Gaines compares himself with regards to cleaning duties were not supervised by the same supervisor, and so are not similarly situated employees. *Radue v. Kimberly-Clark Corp.*, 219 F.3d 512, 617-18 (7th Cir. 2000) (similarly situated employees must have substantial similarity in performance,

qualification, and conduct, showing that the two employees had the same supervisor, were subject to the same standards, and engaged in similar alleged misconduct).

"Without a prima facie case, the plaintiff cannot withstand summary judgment." *Hong v. Children's Memorial Hosp.*, 993 F.2d 1257, 1261 (7th Cir. 1993), cert. denied, 551 U.S. 1005 (1994), Gaines' failure to present a prima facie case of discrimination under Title VII in Change No. 240A20085 compels the court to grant WREP's motion for summary judgment as to such claims.

B. Title VII Claims of Retaliation

Gaines alleges claims of retaliation in EEOC

Charge No. 240A201240. Specifically, Gaines alleges in that charge that he was denied 1.5 hours of training pay for "confined space training" on December 13, 2001; he and only he has been restricted to sending e-mail to no more than five employees but he was forced to e-mail more than five employees on January 18, 2002; Wolsiefer-Leak failed to respond to his questions about the e-mail restriction; Gaines was directed not to use e-mail to clarify policy; he was discouraged from using internal complaint procedure; and his EEOC complaints always result in findings of "no violation."

Under Title VII, an employer may not take an adverse employment action or discriminate against an employee because he has opposed an unlawful employment practice or has made a charge under the statue. See 42 U.S.C. § 2000e-3(a).

In *Stone v. City of Indianapolis Public Utilities Div.*, 281 F.3d 640 (7th Cir.), cert. denied, 123 S. Ct. 79 (2002), the Court of Appeals clarified the proper standard for summary judgment when a plaintiff claims that he was retaliated against for complaining about employment discrimination. The direct evidence method consists of presenting

> direct evidence (evidence that establishes without resort to inferences from circumstantial evidence) that he engaged in protected activity (filing a charge of discrimination) and as a result suffered the adverse employment action of which he complaints. If the

> evidence is uncontradicted, the plaintiff is entitled to summary judgment. If it is contradicted, the case must be tried unless the defendants presents unrebutted evidence that he would have taken the adverse employment action against the plaintiff even if he had had (sic) no retaliatory motive; in that event the defendant is entitled to summary judgment because he has shown that the plaintiff wasn't harmed by retaliation.

Id. at 644.

The second route to summary judgment, the adaptation of *McDonnell Douglas* to the retaliation context, requires the plaintiff to show that after filing the charge only he, and not any similarly situated employee who did not file a charge, was subjected to an adverse employment action even though he was performing his job in a satisfactory manner. If the defendants presents no

evidence in response, the plaintiff is entitled to summary judgment. If the defendants presents unrebutted evidence of a noninvidious reason for the adverse action, he is entitled to summary judgment.

Id.

Gaines' claims of retaliation cannot survive WREP's motion for summary judgment under

either of the above tests:

First, Gaines has produced no direct evidence of discrimination based on his filing of the EEOC charges in August and October 1991 (sic). WREP does not dispute that Gaines engaged in protected activity, but argues that none of the conduct alleged constitutes an actionable adverse employment action, "a significant change in employment." *Bell,* 232 F.3d at 555. The court agrees. The WREP management directives concerning e-mail after finding that Gaines abused the e-mail system in the past, and the failure to pay Gaines for 1.5 hours of pay until he submitted the request in proper form are not 'adverse" actions.

The second means of surviving WREP's motion for summary judgment, which requires Gaines establish a prima facie case of retaliation under Title VII, fails for the same reason as under the direct evidence method. Gaines cannot establish any actionable adverse employment action on the part of WREP. Even if he had, WREP has offered a legitimate, nondiscriminatory reason for each action. WREP allowed Gaines to e-mail more than five employees as an exception to the earlier restriction because the e-mail requested from Gaines was strictly job-related and would not result in numerous uninterested individuals receiving e-mail messages from Gaines. Wolsiefer-Leak did not respond to Gaines' e-mail seeking clarification because she believed Russell was handling the matter. Gaines has not been prevented from using the internal company complaint procedure. Rather, he has disagreed with the response that he has received.

Gaines was not paid for a particular 1.5 hour training because he did not submit a timecard requesting pay for that session. Gaines failed to meet his ultimate burden of establishing that these reasons were merely pretextual. *Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1009 (7th Cir. 2000).

To the extent Gaines alleges in EEOC Charge No. 240A20085 that he was retaliated against for having filed a previous charge, the discussion of Gaines' disparate treatment claims alleged in that charge also disposes of any retaliation claim and further discussion here of such a claim is not warranted.

Based on the foregoing, therefore, Gaines has neither made a showing of direct evidence of retaliation, nor has he set forth a prima facie case of retaliation. WREP's motion for summary judgment must be granted as to Gaines' claims of retaliation.

C. State Law Claims Of Conspiracy and Fraud

Gaines alleges in his complaint that "conspiracy" and "fraud" "will be claimed." The affidavit in support of Gaines' motion to include a pleading of conspiracy and/or fraud in summary judgment brief, filed on June 25, 2002, contains allegation that certain managers of WREP "perfected fraud against the plaintiff." Gaines does not base his claims on any federal cause of

action for conspiracy or fraud, and so the court will treat them as though asserted under Indiana law.

Gaines alleges the following acts of "fraud" or "conspiracy:" 1) after Manager Farnham assured Gaines in May 1997 that Gaines could have input into decisions, when Gaines objected to a changed in shift schedules, he was given a letter of reprimand in July 1997; 2) after being assured by Manager Russell that the rule against sending e-mail to more than five people at a time could be suspended under certain circumstances based on common sense, Gaines sent an e-mail to more than five people and received a letter of reprimand; 3) in January 2001, Manager Russell changed the plant rotation schedule from every three months to every two weeks, and Gaines' attempt to have "input" into that schedule by objecting to it, resulted in another letter of reprimand; 4) Gaines' attempt to appeal the January 2001 letter of reprimand was prevented by Manager Wolsiefer-Leak when she responded to his complaint that "I expect this to end here."

Gaines' claim that individual manager of WREP conspired or perfected fraud against Gaines is dismissed for several reasons. First, Gaines challenged the July 1997 letter of reprimand in his first lawsuit against WREP, *Gaines v. White River Environmental Partnership, et al,* IP 98-1741-C-M/S, and that claim will not be reconsidered here.

Second, even if these were all "new" claims, Gaines has failed to state a claim upon which relief can be granted because there is not a shred

of evidence that the defendants had agreed to engage in any unlawful activity. *Huntington Mortg. Co. v. DeBrota,* 703 N.E. 2d 160, 168 (Ind. Ct App. 1998) ("Civil conspiracy is defined as a combination of two or more persons, by concerted action, to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means.") Moreover, any conspiracy claim is barred by the intracorporate conspiracy doctrine. See *Jamerson v. Anderson Newspapers, Inc.,* 469 N.E. 2d 1243, 1251, (Ind. Ct. App. 1984); *Payton v. Rush-Presbyterean-St. Luke's Med. Ctr.,* 184 F.3d 623, 632 (7th Cir. 1999) (a "conspiracy cannot exist solely between members of the same entity").

Third, Gaines has also failed to state a claim of fraud under Indiana law. The elements of a claim of fraud under Indiana law are:

> 1) a material misrepresentation of a past or existing fact which 2) was untrue, 3) was made with knowledge of or in reckless ignorance of its falsity, 4) was made with the intent to deceive, 5) was rightfully relied upon by the complaining party, and 6) which proximately cause the injury or damage complained of.

Lawyers Tile Ins. Corp. v. Pokraka, 595 N.E. 2d 244, 249 (Ind. 1992).

Although Gaines may perceive that certain managers misled him with statements made about input into decisions or e-mail rules or the disciplinary process, he has not identified any misrepresentations that were made with knowledge that they were false and made with an intent to deceive. Nor has Gaines shown any reasonable reliance on any misrepresentations. Gaines' personal beliefs or speculations fail to establish the required elements of his claim. Moreover, because there were no misrepresentations, there is no causation of injury. The only "injury" arguable alleged is the receipt of written reprimands but Gaines presented no evidence of any change in or loss of job, benefits, pay or responsibilities. The defendants are entitled to summary judgment as to Gaines' claims of conspiracy and/or fraud.

D. Remaining Statutory Claims

The remaining statutory claims do not support relief and require little discussion.

Although 42 U.S.C. § 1981 applies only to alleged discrimination on the basis of race or alienage, *Bratton v. Roadway Package System, Inc.*, 77 F.3d 168, 177 (7th Cir. 1996) (§ 1981 does not provide a cause of action for sex discrimination claims."), the Title VII analysis controls any claims asserted pursuant to 42 U.S.C. § 1981 on the basis of race. *Johnson v. City of Fort Wayne*, 91 F.3d 922, 940 (7th Cir. 1996); *Rush v. McDonald's Corp.*, 966 F.2d 1104, 1119 (7th Cir. 1992)

WREP is not a state actor, as required

to support a claim of 42 U.S.C. § 1983. *Moore v. Marketplace Restaurant,* 754 F.2d 1336, 1352 (7th Cir. 1985) (Section 1983 plaintiff must "demonstrate that state officials and the private party somehow reached an understanding to deny the plaintiff their constitutional rights." Therefore, Gaines' claims based on various amendments to the Constitution fail to state a claim upon which relief can be granted.

IV. Conclusion

"Employers may act for many reasons, good and bad; they may err in evaluating employees' strengths; unless they act for a forbidden reason, these errors (more properly differences in assessments) do not matter." *Kuhn v. Ball State Univ.,* 78 F.3d 330, 332 (7th Cir. 1996). Gaines has failed to establish a genuine issue of material fact or that he is entitled to judgment as a matter of law as to any of his claims. Accordingly, Gaines' motion for summary judgment must be denied and the defendants' motion for summary judgment must be granted.

Judgment consistent with this Entry shall now issue.

IT IS SO ORDERED

S / JOHN D. TINDER, Judge
United States District Court

Date: 3/27/2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

LOUIS F. GAINES,	)	
	)	
Plaintiff,	)	
	]	
vs.	)	IP 02-595-T/K
	)	
WHITE RIVER ENVIRONMENTAL PARTNERSHIP, et al.,	)	
	)	
	)	
Defendants.		

JUDGMENT

The court, having this day made its Entry,

IT IS THEREFORE ADJUDGED that judgment is entered for the defendants and against the plaintiff as to the claims in this action.

The costs of this action are assessed against the plaintiff.

S / JOHN D. TINDER, Judge
United States District Court

Date: 3/27/2003

Copies to:

Louis F. Gaines
5337 N College Avenue
Indianapolis, IN 46220

Alan McLaughlin
Eirc Papier
Baker & Daniels
300 N Meridian St., Suite 2700
Indianapolis, IN 46204

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

LOUIS F. GAINES,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	IP 02-595-T/K
	)	
WHITE RIVER ENVIRONMENTAL PARTNERSHIP, et al.,	)	
	)	
	)	
Defendants	)	

ENTRY DISCUSSING PLAINTIFF'S MARCH 27, 2003, FILINGS

The court has considered the plaintiff's motion to vacate Entry of March 14, 2002, his affidavit in support, and his motion to strike, each filed on March 27, 2003.

The basis for each of these filings is that the plaintiff believes the court unfairly granted the defendants time to file their response to the plaintiff's motion for summary judgment while at the same time the court struck from the record several of the plaintiff's filing which were filed after he filed his initial response to the defendants' motion for summary judgment. Any relief sought by the plaintiff's March 27, 2003,

filings is denied. The reason for this disposition is that there is no basis to strike the defendants' response to the plaintiff's motion for summary judgment or their cross-motion for summary judgment, filed on September 3, 2002. The defendants, unlike the plaintiff, had filed a motion for enlargement of time on August 30, 2002, which the court granted, making their September 3, 2002, filing timely. Moreover, the defendants filed a single response to the plaintiff's motion. The plaintiff, on the other hand, never sought additional time to file any supplemental responses to the defendants' motion. Rather, he filed a series of responses, weeks and months apart, without leave of court. This is not the proper manner in which to brief a pending dispositive motion. There was no error in the rulings issued on March 14, 2003.

IT IS SO ORDERED.

S / JOHN D. TINDER, Judge
United States District Court

Date: 3/31/2003

Copies to:

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Alan McLaughlin
Eric Paper
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300 N Meridian St., Suite 2700
Indianapolis, IN 46204

APPENDIX D: Other Relevant Rulings

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LOUIS F. GAINES,	)	IP 98-1741-C-M/S
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
WHITE RIVER ENVIRON-MENTAL PARTNERSHIP, et al.,	)	
	)	
Defendants.	)	

ENTRY DISCUSSING SECOND MOTION TO AMEND COMPLAINT AND SETTING DISCOVERY CONFERENCE

I. Second Motion to Amend Complaint

On June 1, 1999, the plaintiff filed his "second motion to amend complaint. The essence of this motion is that the plaintiff seeks to expand on his claims in this action by asserting the same claim which has been submitted to the EEOC in the form of a charge of discrimination, *No. 240-99-1616.

The charge of discrimination in No. 240-99-1616 was filed on May 4, 1999, and alleges retaliation and age discrimination from January 10, 1998 through April 20, 1999, and is included as an exhibit to the motion. Although the plaintiff

has requested a right to sue letter from the EEOC, no right to sue notice had been issued with respect to No. 240-99-1616 as of the filing of the plaintiff's motion on June 1, 1999.

---

* A subsidiary portion of the second motion to amend amounts to the plaintiff's effort to bolster his claims with additional details he believes to be supportive of his claims. It is unnecessary and unhelpful to replead a claim with increasing detail. The details of the plaintiff's claims are precisely what discovery and various pretrial disclosures are designed to unveil.

No cognizable claim under Title VII could be stated in relation to events after January 10, 1998, until a right to sue notice has been issued. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). No amendment to a pleading should be permitted if the amendment would be futile, and an amendment would be futile if it could not withstand a motion to dismiss under Rule 12(b)(6). *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997).

Because the additional claim of discrimination which the plaintiff proposes to assert relating to the charge of discrimination in No. 240-99-1616 was filed on May 4, 1999, could not be maintained at this point (because no right to sue letter has been issued), the proposed amendment would be futile. The plaintiff's second motion to amend

is therefore denied.

The plaintiff's "proposed motion to amend complaint, filed on June 10, 1999, is duplicative of the second motion to amend complaint and is denied as such.

II. Discovery Conference

...

IT IS SO ORDERED

s/ LARRY J. McKINNEY, Judge
United States District Court

Date: August 19 1999

Copies to:

Louis F. Gaines, 5337 N. College Avenue, Indianapolis, IN 46220

Hudnall Pfeiffer, Carolyn Coleman, Baker & Daniels, 300 N. Meridian St., Suite 2700, Indianapolis, IN 46204

Glen Cunningham, Court Reporter

Pro Se Administrator

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LOUIS F. GAINES,	)	
	)	
Plaintiff	)	
	)	
v.	)	IP-98-1741-C-M/C
	)	
WHITE RIVER ENVIRON-MENTAL PARTNERSHIP, et al.,	)	
	)	
Defendants	)	

ENTRY CONCERNING SELECTED MATTERS

The court, having considered the above action and the matters which are pending, now makes the following rulings:

...

3. In the court's Entry of August 19, 1999, in which it denied the plaintiff's second motion to amend complaint, the court based its decision on its understanding that the plaintiff had not received a right to sue notice from the EEOC with respect to charge No. 240991616 as the filing of the plaintiff's motion on June 1, 1999. Through inadvertence, the court did not acknowledge in its Entry of August 19, 1999, that on July 12, 1999, the plaintiff filed a copy of the right to sue notice

just described. In order to correct and clarify the record, the court now reconsiders the portion of its ruling of August 19, 1999, which denied the plaintiff's second motion to amend complaint.

a. The charge of discrimination in No. 240991616 was filed with the EEOC on May 7, 1999, and alleged retaliation and age discrimination occurring from January 5, 1999, through April 20, 1999, which was after the complaint in this action was filed. The right to sue notice relating to charge NO. 240991616 was issued on July 9, 1999.

b. The procedure posture of this action is as follows: the action was filed on December 18, 1998, the defendants filed a motion for summary judgment on July 9, 1999, and discovery is seemingly tumultuous. In *Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 774-75 (7th Cir. 1995), the Seventh Circuit cited a number of its published decisions which had affirmed the denial of a motion to amend after the filing, briefing or decision of a motion for summary judgment. The principal basis of the court's decisions in these cases was the unwarranted delay and burden an amended complaint would bring to the litigation.

c. The court finds that the present litigation also has progressed too far to permit the addition of entirely new claims, based on events unrelated to the events which supported the filing of the original complaint. A motion for summary judgment has been filed and the parties are embroiled in discovery concerns relating to the

claims in the amended complaint. Under these circumstances, the plaintiff's second motion to amend complaint, filed on June 1, 1999, remains denied. The ruling in Part I of the Entry issued on August 19, 1999, remains in effect, though modified by the additional factual matters noted in this Entry. For the same reasons, the plaintiff's third motion to amend complaint, filed on August 23, 1999, is also denied.

...

IT IS SO ORDERED.

s/ LARRY J. McKINNEY, Judge
United States District Court

Date: October 25, 1999

Copies to:

Louis F. Gaines, 5337 N. College Avenue, Indianapolis, IN 46220

Hudnall Pfeiffer, Carolyn Coleman, Baker & Daniels, 300 N. Meridian St., Suite 2700, Indianapolis, IN 46204.

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

UNITED STATES COURT Of APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 5, 2001
Decided March 23, 2001

Before

Hon. F. H. EASTERBROOK, Circuit Judge

Hon. D. A. MANION, Circuit Judge

Hon. D. P. WOOD, Circuit Judge

No. 00-3802

LOUIS F. GAINES,
Plaintiff-Appellant

v.

WHITE RIVER ENVIRONMENTAL PARTNERSHIP, et al.,
Defendants-Appellees

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. 98-1741-C-M/S

Larry J. McKinney,
Chief Judge

ORDER

Louis Gaines, an African-American employed as an Operation Specialist for the defendant White River Environmental Partnership (WREP), filed

this employment discrimination suit in December 1998 under Title VII, 42 U.S.C. 2000e et seq., the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, and 42 U.S.C. § 1981. The district court granted summary judgment for the defendants, holding that Gaines had not established a prima facie case of discrimination. Gaines appeals and we affirm.

...

For the foregoing reasons, we Affirm the grant of summary judgment to WREP. All pending motions in this case are Denied.

UNITED STATES COURT OF APPEALS

For the Seven Circuit
Chicago, Illinois 60604

May 17, 2001

Before

Hon. F. H. EASTERBROOK, Circuit Judge

Hon. D. A. MANION, Circuit Judge

Hon. D. P. WOOD, Circuit Judge

No. 00-3802

LOUIS F. GAINES,
Plaintiff-Appellant

v.

WHITE RIVER ENVIRONMENTAL PARTNERSHIP, et al.,
Defendant-Appellee

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. 98-1741-C-M/S

Larry J. McKinney, Chief Judge

ORDER

Our order of March 23, 2001 affirmed the district court's grant of summary judgment to the defendants in Gaines's employment discrimination

suit. Because Gaines' claims were frivolous and his litigation strategy was marked by the filing of numerous motions and appeals containing spurious allegations of impropriety of Judge McKinney and defense counsel, we directed Gaines show cause why sanctions should not be imposed under Federal Rule of Appellate Procedure 38. Gaines has filed his response, and the matter is ready for decision.

Rather than present a reason not to sanction him, Gaines's response demonstrates that he wishes to continue to his frivolous litigation strategy. In his response, Gaines reiterates his belief that the defendants have violated his rights, asserts that all of his filings were necessary to defend his rights, and suggests that we should sanction the defendants rather than him. Furthermore, three days after he filed his response Gaines filed a petition for rehearing of his appeal, once again raising the same frivolous claims of discrimination.

Gaines is hereby sanctioned $1,000 for filing a frivolous appeal. Gaines shall tender a check payable to the Clerk, United States Court of Appeals, in the amount of $1,000 by May 30, 2001. Furthermore, we DENY his petition for rehearing.

APPENDIX E: Legal Authority

UNITED STATES CONSTITUTION:

Fifth Amendment: ..., nor deprived of life, liberty, or property, without due process of law.

Eighth Amendment: ..., nor excessive fines imposed; nor cruel and unusual punishment inflicted.

Thirteenth Amendment, Section I: Neither slavery nor involuntary servitude, ..., shall exist within the United States, or any place subject to their jurisdiction.

TITLE 29, U.S.C. §§:

623(a): It shall be unlawful for an employer - (1) ... or otherwise discriminate against any individual with respect to his compensations, terms, conditions or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; (3) to reduce the wage rate of any employee in order to comply with this chapter.

623(d): It shall be unlawful for an employer to discriminate against any of his employees ..., because such individuals ... have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

TITLE 42 U.S.C., §§:

1981: All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

1981(c): The rights protected by this section are protected against impairment by non governmental discrimination and impairment under color of State law.

1983: Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.

2000e-2(a): It shall be an unlawful employment practice for an employer - (1) ..., to discriminate against individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees ... in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an

employee, because of such individual's race, color, religion, sex, or national origin.

2000e-2(k)(c)(2): A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

2000e-2(m): Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

2000e-3(a): It shall be an unlawful employment practice for an employer to discriminate against any of his employees ..., because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

FEDERAL RULES OF:

Appellate Procedure, Rule 35

(a) When Hearing Or Rehearing En banc May Be Ordered. A majority of the current judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing

or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the courts decisions; or

(2) the proceeding involves a question of exceptional importance.

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc:

(1) the petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflict case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decision

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

(f) Call for a Vote. A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge call for a vote.

Appellate Procedure, Rule 38

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Civil Procedure, Rule 9:

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mand of a person may be averred generally.

Civil Procedure, Rule 56:

(c) Motion and Proceedings Thereon: ... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitle to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability along although there is a genuine issue as to amount of damages.

(e) Form of Affidavits; Further Testimony; Defenses Required: ... The court may permit affidavits to be supplemented or opposed by deposition, answers to interrogatories, or further

affidavits. When a motion for summary judgment is made and supported as provided in this rule, and adverse party may not rest upon the mere allegations or denials of the adverse party pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Evidence, Rule 406:

Habit; Routine Practice. Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person, or organization on a particular occasion was in conformity with the habit or routine practice.